No. 134, Original

In The

Supreme Court of the United States

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF DELAWARE,

Defendant.

REPORT OF THE SPECIAL MASTER

RALPH I. LANCASTER, JR.
Special Master

April 12, 2007

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REPORT OF THE SPECIAL MASTER

BACKGROUND

In this original action the States of New Jersey and Delaware make competing claims for the right to exercise regulatory jurisdiction over wharves and other improvements extending from the New Jersey shore into the Delaware River[1] within the so-called twelve-mile circle.[2] Each State claims exclusive jurisdiction over such improvements: New Jersey on the basis of the Compact of 1905 (the "Compact") entered into between the two States; Delaware principally on the basis of the decision of this Court in *New Jersey v. Delaware*, 291 U.S. 361 (1934). Delaware argues in the alternative that, even if Delaware's jurisdiction is not exclusive, New Jersey's jurisdiction is limited and also non-exclusive, resulting in the two States having overlapping jurisdiction.

This Report discusses the States' contentions and sets forth recommendations for the Court. Briefly stated, the Report recommends that the Court rule that, within the twelve-mile circle, (i) New Jersey's authority to convey riparian lands extends only to the boundary between the States at the low water mark[3] on the New Jersey side of

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[1] This Report sometimes refers to the Delaware River simply as the "River."

[2] The twelve-mile circle is defined as "the circle the radius of which is twelve miles, and the center of which is the building used prior to 1881 as the courthouse at New Castle, Delaware," the precise arcs of which are described more fully in *New Jersey v. Delaware*, 295 U.S. 694, 695-98 (1935). Unless otherwise indicated, all references in this Report to the eastern or New Jersey shore or side of the River refer to that portion within the twelve-mile circle.

[3] The low water mark of a river is "the point to which the water recedes at its lowest stage." Black's Law Dictionary at 1586 (7th ed.

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the River, (ii) the Compact preserves for riparian owners on New Jersey's shore of the River their riparian rights as defined under New Jersey law, including the right to construct wharves, piers and other improvements extending outshore of the boundary into Delaware's territory, (iii) outshore of the low water mark, New Jersey's authority to exercise jurisdiction over riparian improvements is limited by the Compact's preservation of only "riparian jurisdiction," not complete jurisdiction to the fullest extent of New Jersey's police powers; and (iv) outshore of that low water mark, Delaware, as the sovereign, retains overlapping jurisdiction to exercise its full complement of police powers to regulate riparian improvements extending from New Jersey's shore.

I. *New Jersey v. Delaware I.*

The dispute between New Jersey and Delaware over the common boundary the States share along the River is well known to the Court. On two prior occasions, New Jersey has invoked the Court's original jurisdiction in disputes concerning the same boundary.[4] As the Court observed on one of those prior occasions, "almost from the beginning of statehood Delaware and New Jersey have been engaged in a dispute as to the boundary between them." *New Jersey v. Delaware II*, 291 U.S. at 376. Historically, New Jersey claimed to the middle of the River

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1999). References to the low water mark contained in this Report are intended to identify the low water mark on the eastern shore of the River unless otherwise noted.

[4] *New Jersey v. Delaware*, No. 1, Orig. (filed 1877) (hereinafter "*New Jersey v. Delaware I*"); *New Jersey v. Delaware*, No. 11, Orig. (filed 1929, sometimes identified by other Original docket numbers) (hereinafter "*New Jersey v. Delaware II*").

channel, while Delaware claimed to the low water mark on New Jersey's shore.

In the latter part of the nineteenth century, New Jersey and Delaware treated ownership of riparian lands differently in several respects. New Jersey claimed State ownership of navigable rivers, such as the River, up to the high water mark; Delaware claimed ownership only up to the low water mark. *See Bailey v. Driscoll*, 117 A.2d 265 (N.J. 1955) ("In this state it is settled that the title of the riparian owner extends only to the high-water mark."); *City of Wilmington v. Parcel of Land Known as Tax Parcel No. 26.067.00.004*, 607 A.2d 1163, 1168 (Del. 1992) ("title to riparian property extends from the upland to the low water mark"). As a result, to construct improvements extending into the River, a riparian owner in New Jersey had to obtain from the State a grant or conveyance of the land between low and high water marks. *See Bailey*, 117 A.2d at 268-69. Delaware did not make such grants or conveyances as it recognized title in riparian landowners extending from the shore out to the low water mark.

New Jersey sought to invoke this Court's original jurisdiction in the first instance after the States reached an impasse over disputed fishing rights on the River in the 1870s. In 1871, Delaware enacted a statute that required non-Delaware residents to get a $20 annual license from Delaware to fish in the River, while requiring Delaware residents to pay only $5 for the same license.[5] Roughly a year later, on May 2, 1872, Delaware arrested several New Jersey citizens at gunpoint and impounded their boats

[5] An Act for the Protection of Fishermen (Mar. 28, 1871) (Delaware's Appendix ("DA") 913-16).

because they were fishing east of the middle of the River without obtaining the required Delaware license.[6] Not surprisingly, those arrests precipitated a heated exchange between the States.

On May 8, 1872, only six days after the arrests, New Jersey's Governor issued a proclamation stating: "I hereby give notice and proclaim that the State of New Jersey claims jurisdiction over that part of the river Delaware, between the States of Delaware and New Jersey, which is easterly of the middle line of said river, and further claims that all persons who conform to the fishing laws of the State of New Jersey have the right to fish on the eastern side of said river, without permission or license of any other State."[7]

Less than a week later, on May 14, 1872, Delaware's Governor responded by stating that "[t]he State of Delaware does not regard the question as to her jurisdiction over the said river and bay, as claimed by her, as an open question," and that Delaware's jurisdiction is "exclusive over the waters of said river to low water mark, on the eastern side of said river, within the twelve mile circle from New Castle, and is regarded by said State as paramount to any which may be claimed by any other State."[8]

Over the ensuing years, the States attempted to defuse the dispute over fishing rights by appointing

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[6] *See* Report of Carol E. Hoffecker ("Hoffecker Rep.") at 14-16 (DA 4213).

[7] Proclamation of New Jersey Gov. Joel Parker (May 8, 1872) (DA 39).

[8] Letter from Delaware Gov. James Ponder to New Jersey Gov. Joel Parker (May 14, 1872) (DA 929-30).

commissioners to negotiate an interstate compact.[9] Unfortunately, the commissioners were unable to reach an agreement to resolve the ongoing dispute. Delaware eventually revoked the authority of its commissioners in March 1875.[10]

In 1877, New Jersey commenced its first original action against Delaware before the Court in an attempt to establish the disputed boundary in the River. In its Complaint, New Jersey asserted that its "part of the bed of said river extends from the New Jersey shore thereof to the middle of said river."[11] Promptly thereafter, the Court issued a preliminary injunction enjoining Delaware from

> imposing any tax, assessment or imposition whatsoever, by way of license fee or otherwise, upon any citizen or resident of the State of New Jersey, and from requiring them, or any of them, to take a license from or under the State of Delaware for right or authority to fish in the river Delaware, as they have heretofore been accustomed to do . . . and from arresting, imprisoning, trying, fining, or in any manner punishing, or seizing, holding or selling any property of any citizen or resident of New Jersey for fishing in said river as aforesaid, until this Court shall make other order to the contrary.[12]

That action thereafter "slumbered for many years," *New Jersey v. Delaware II*, 291 U.S. at 376, while the

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[9] Joint Resolutions by Delaware Legislature, Jan. 30, 1873 (DA 40); 1873 N.J. Laws p. 20 (DA 826-27).

[10] Joint Resolution by Delaware Legislature, Mar. 26, 1875 (DA 48).

[11] New Jersey's Complaint in *New Jersey v. Delaware I* (DA 20).

[12] Order dated March 26, 1877 in *New Jersey v. Delaware I* (DA 67-68).

States again entered into negotiations over language for an interstate compact. Thirty years later, in April 1907, following the ratification of the Compact of 1905, this Court, at New Jersey's request, dismissed its Complaint without prejudice. *See New Jersey v. Delaware*, 205 U.S. 550 (1907) (hereinafter "*New Jersey v. Delaware I*").

II. The Compact of 1905 Between New Jersey and Delaware.

After the Court entered the preliminary injunction in *New Jersey v. Delaware I*, the case remained pending and the States' dispute remained unresolved until 1903. That year, the Attorneys General for both States reported to their respective Governors that they were in agreement that an amicable resolution of the controversy should again be attempted through commissioners.[13] Both States thereafter appointed commissioners.[14]

The commissioners met in Philadelphia on March 12 and 14, 1903, and agreed upon a compact that was presented

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[13] John Hunn, Governor of Delaware, Message to Delaware General Assembly and Joint Resolution of the Delaware General Assembly (Jan. 31, 1903) (DA 1065); Letter from Franklin Murphy, Governor of New Jersey, to the New Jersey Legislature (Mar. 3, 1903) (DA 1081).

[14] Delaware's commissioners were Governor John Hunn, Attorney General Herbert H. Ward and George H. Bates, its *New Jersey v. Delaware I* counsel. Journal of the Senate of the State of Delaware, pp. 896-903 (Mar. 16, 1903) (DA 1104-05, 1113). New Jersey's commissioners were Governor Franklin Murphy, Attorney General Thomas N. McCarter and Chancery Clerk Edward C. Stokes (who later became Governor of New Jersey in 1905). Acts, Votes and Proceedings, Correspondence, Reports, Resolutions of the 47th New Jersey's General Assembly, Trenton (Nov. 7, 1820 – Apr. 16, 1929) (DA 835-36).

to their respective legislatures on March 16, 1903.[15] The New Jersey legislature approved that 1903 version of the compact shortly thereafter; however, the Delaware legislature rejected it, and it therefore did not go any further.[16]

At the request of both States, the Court appointed a special examiner in another attempt to resolve the parties' differences.[17] The examiner conducted a series of hearings commencing on November 7, 1903, and continuing periodically into 1905. When nothing was resolved as a result of the examiner's efforts, in February 1905 the States again appointed commissioners to conduct negotiations.[18] The commissioners agreed upon a new compact that essentially copied the terms of the proposed 1903 compact, only amending the 1903 draft to make the compact also applicable below the twelve-mile circle in the River and Bay and to provide for placement of monuments marking the

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[15] Journal of the Senate of the State of Delaware, pp. 896-903 (Mar. 16, 1903) (DA 1103); Minutes of the New Jersey General Assembly, pp. 549-50 (Mar. 16, 1903) (DA 1109).

[16] Letter from the Attorney General of New Jersey to George H. Bates (Apr. 2, 1903) (DA 1123); Letter from Commissioners of the State of Delaware to Commissioners of the State of New Jersey (Mar. 28, 1903) (DA 1117).

[17] Joint Stipulation, *New Jersey v. Delaware I* (May 28, 1903) (DA 171).

[18] Delaware reappointed former Attorney General Herbert H. Ward, and the State's counsel George H. Bates and also appointed Governor Preston Lea and Attorney General Robert H. Richards. 24 Del. Laws ch. 216 (1905) (DA 1169-70). New Jersey reappointed Governor Edward C. Stokes and former Governor Franklin Murphy, and appointed Attorney General Robert H. McCarter (brother of Thomas McCarter, one of the prior commissioners) and attorney Chauncey G. Parker. Joint Resolution of the New Jersey Senate and General Assembly (Feb. 14, 1905) (New Jersey's Appendix ("NJA") 1315a).

division of the River and Bay.[19] The States thereafter approved the Compact: Delaware on March 20, 1905, and New Jersey on the following day.[20]

The Compact contains a preamble and nine articles. The preamble states that the States' commissioners had been appointed "for the purpose of agreeing upon and settling the jurisdiction and territorial limits of the two States."[21] The preamble further states that "a controversy hath heretofore existed between the States of New Jersey and Delaware relative to the jurisdiction of such portion of the Delaware River as is included within the circle of twelve-mile radius," and that "it is the mutual desire of said States to so settle and determine such controversy as to prevent future complications arising therefrom."[22] Finally, the preamble recites that the Compact was entered into with the aim of achieving an "amicable termination of said suit between said States now pending in the Supreme Court of the United States, and the final adjustment of all controversies relating to the boundary line between said States, and to their respective rights in the Delaware River and Bay."[23] Nevertheless, the ultimate question of the precise boundary line between the States was not addressed in the Compact and thus was left unresolved.

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[19] Compact, attached hereto as Appendix B.

[20] 23 Del. Laws ch. 5 (1905) (NJA 6a); 1905 N.J. Laws ch. 5 (1905) (NJA 262a).

[21] Compact Preamble, App. B-1.

[22] *Id.*

[23] *Id.*

Other material provisions of the Compact provide the following.

Article I states that:

> Criminal process issued under the authority of the State of New Jersey against any person accused of an offense committed upon the soil of said State, or upon the eastern half of said Delaware River, or committed on board of any vessel being under the exclusive jurisdiction of that State, and also civil process issued under the authority of the State of New Jersey against any person domiciled in that State, or against property taken out of that State to evade the laws thereof, may be served upon any portion of the Delaware River between said States from low-water mark on the New Jersey shore to low-water mark on the Delaware shore, except upon Reedy and Pea Patch islands, unless said person or property shall be on board a vessel aground upon or fastened to the shore of the State of Delaware, or the shores of said islands, or fastened to a wharf adjoining thereto, or unless such person shall be under arrest or such property shall be under seizure by virtue of process or authority of the State of Delaware.[24]

Article II provides comparable criminal process authority for Delaware, stating:

> Criminal process issued under the authority of the State of Delaware against any person accused of an offense committed upon the soil of said State, or upon the western half of said Delaware River, or committed on board of any

[24] *Id.*

> vessel being under the exclusive jurisdiction of that State, and also civil process issued under the authority of the State of Delaware against any person domiciled in that State, or against property taken out of that State to evade the laws thereof, may be served upon any portion of the Delaware River between said States from low-water mark on the Delaware shore to low-water mark on the New Jersey shore, unless said person or property shall be on board a vessel aground upon or fastened to the shore of the State of New Jersey, or fastened to a wharf adjoining thereto, or unless such person shall be under arrest or such property shall be under seizure by virtue of process or authority of the State of New Jersey.[25]

Article III addresses the States' fishing rights, providing:

> The inhabitants of the said States of Delaware and New Jersey shall have and enjoy a common right of fishery throughout, in, and over the waters of said river between low-water marks on each side of said river between the said States, except so far as either State may have heretofore granted valid and subsisting private rights of fishery.[26]

Article IV required the States to appoint commissioners to meet "for the purpose of drafting uniform laws to regulate the catching and taking of fish in the Delaware River and Bay between said two States."[27] Article IV

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[25] *Id.*

[26] *Id.*

[27] *Id.*

further provides that, "Each State shall have and exercise exclusive jurisdiction within said river to arrest, try, and punish its own inhabitants for violation of the concurrent legislation relating to fishery herein provided for."[28]

Article V also addresses fishing rights, and states:

> All laws of said States relating to the regulation of fisheries in the Delaware River not inconsistent with the right of common fishery hereinabove mentioned shall continue in force in said respective States until the enactment of said concurrent legislation as herein provided.[29]

Article VI addresses the States' rights with respect to oysters and other shellfish in the disputed territory, providing:

> Nothing herein contained shall affect the planting, catching, or taking of oysters, clams, or other shell fish, or interfere with the oyster industry as now or hereafter carried on under the laws of either State.[30]

Of particular note to the instant dispute, Article VII states:

> Each State may, on its own side of the river, continue to exercise riparian jurisdiction of every kind and nature, and to make grants, leases, and conveyances of riparian lands and rights under the laws of the respective States.[31]

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[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

As discussed below, the scope of the States' "riparian jurisdiction" contained in Article VII is at the heart of the present controversy.

Article VIII provides:

> Nothing herein contained shall affect the territorial limits, rights, or jurisdiction of either State of, in, or over the Delaware River, or the ownership of the subaqueous soil thereof, except as herein expressly set forth.[32]

Finally, Article IX provided that the Compact would be submitted to the States' legislatures for approval, then to Congress for ratification, and that upon ratification "it shall be and become binding in perpetuity upon both of said States" and *New Jersey v. Delaware I* "shall be discontinued . . . without prejudice."[33]

The States appointed commissioners to consider adoption of uniform fishing laws under Article IV.[34] The States also submitted the Compact to Congress for ratification and the Senate approved the Compact.[35] The States asked the House of Representatives to defer taking any action on the Compact, pending the adoption of uniform fishing laws, and further asked the Court to stay proceedings in *New Jersey v. Delaware I* pending congressional ratification of the Compact.[36]

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[32] *Id.*

[33] *Id.*

[34] 23 Del. Laws ch. 6 (1905) (NJA 2a); 1905 N.J. Laws ch. 239 (NJA 268a).

[35] S. 4975, 59th Cong. (Mar. 13, 1906) (DA 1190).

[36] Joint Application for Stay in *New Jersey v. Delaware I* (DA 190).

The States' fishing law commissioners reported in January 1907 that they had drafted the uniform laws contemplated by Article IV of the Compact, and suggested that their respective Governors seek final congressional ratification.[37] The States did so, and Congress completed ratification of the Compact on January 24, 1907. Act of Jan. 24, 1907, ch. 394, 34 Stat. 858 (1905).[38] Following congressional ratification of the Compact, and on motion of New Jersey, the Court issued an Order on April 15, 1907 in *New Jersey v. Delaware I*, directing that the "Bill of complaint [be] dismissed without costs and without prejudice." *New Jersey v. Delaware I*, 205 U.S. 550 (1907).

However the comparable fishing laws adopted by both States in 1907 were not identical or "uniform" as contemplated by Article IV.[39] Over the course of many ensuing

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[37] Letter from Alexander B. Cooper, President, and William S. Hilles, Delaware Commissioners, to Robert H. Richards, Attorney General of Delaware (Jan. 19, 1907) (DA 1293); Letter from Robert H. McCarter, Attorney General of New Jersey, to Edward C. Stokes, Governor of New Jersey (Jan. 9, 1906) (DA 1295); Letter from John B. Avis, New Jersey State Senator, to Walter H. Hayes, Secretary, Delaware Commissioners (Jan. 9, 1907) (DA 1297); Letter from Senator William J. Bradley of New Jersey to Alexander B. Cooper, President, Delaware Commissioners (Jan. 9, 1907) (DA 1299); Letter from John B. Avis, New Jersey State Senator, to Walter H. Hayes, Secretary, Delaware Commissioners (Jan. 7, 1907) (DA 1301).

[38] A copy of the Act is found at DA 11.

[39] Hoffecker Rep. 45-47 (DA 4213); Letter from Alexander B. Cooper, President, Delaware Commissioners to Walter H. Hayes, Secretary, Delaware Commissioners (Feb. 28, 1907) (DA 1871); Letter from Alexander B. Cooper, President, Delaware Commissioners to Walter H. Hayes, Secretary, Delaware Commissioners (Mar. 2, 1907) (DA 1873); Letter to Walter H. Hayes, Secretary, Delaware Commissioners (Mar. 7, 1907) (DA 1876).

years, the States endeavored to draft and adopt a uniform set of fishing laws for the River, but failed to do so.[40]

III. *New Jersey v. Delaware II.*

Notwithstanding the ratification of the Compact of 1905, the States' relations on the Delaware River continued in much the same fashion they had followed over the prior century. In 1925 and 1926, the States wrangled over disputed ownership of an oyster bed in the River below the twelve-mile circle. The States again appointed commissioners in an attempt to resolve the boundary dispute, but they could not reach agreement.[41]

In 1929, New Jersey initiated its second original action against Delaware. The Court granted New Jersey leave to file a Bill of Complaint to determine the boundary along the States' common border. *New Jersey v. Delaware II*, 279 U.S. 825 (1929). On motion of New Jersey, the Court appointed a Special Master, *New Jersey v. Delaware II*, 280 U.S. 529 (1930). He conducted hearings and submitted a Report on October 9, 1933. *See New Jersey v. Delaware II*, 55 S. Ct. 934 (1933). The Special Master recommended that the Court hold that, within the twelve-mile circle, Delaware owned up to the low water mark on the eastern or New Jersey side of the River. He also recommended that, below the twelve-mile circle, the Court locate the States' common boundary in the middle of the navigable channel of the River. *See id.* at 966. Both States filed exceptions to the Special Master's Report.

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[40] *See generally* correspondence found at DA 1891-2024.

[41] *See generally* correspondence found at DA 2025-78.

In this second action, the Court was asked to resolve two issues with respect to the boundary separating the States along the River. First, the States pressed their competing claims to "the title to the bed or subaqueous soil of the Delaware river within a circle of twelve miles about the town of New Castle." Delaware asserted it was "the owner of the entire bed of the river within the limits of this circle up to low-water mark on the east or New Jersey side." *New Jersey v. Delaware II*, 291 U.S. at 363. New Jersey claimed "to be the owner up to the middle of the channel." *Id.* at 364. Second, the States asked the Court to resolve "the boundary line between the two states in the river below the circle and in the bay below the river." *Id.* Delaware claimed "the division at the geographical center, an irregular line midway between the banks or shores." *Id.* New Jersey argued that the boundary was defined by the thalweg.[42] *See id.*

The Court thoroughly explored the historical origins of Delaware's claim to a twelve-mile circle centered on the town of New Castle – which extends to the New Jersey shore of a portion of the River – "through deeds going back two and a half centuries and more," originating with the delivery of a deed of feoffment from the Duke of York to William Penn on August 24, 1682. *Id.* at 364. The Court noted, and briefly addressed, the Compact. It observed that the Compact "provides for the enjoyment of riparian rights, for concurrent jurisdiction in respect of civil and criminal process, and for concurrent rights of fishery. Beyond that it does not go." *Id.* at 377-78. But, aside from

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[42] The thalweg is "the track taken by boats in their course down the stream, which is that of the strongest current." *New Jersey II*, 291 U.S. at 379.

noting the existence of the Compact, the Court had little need to address its specifics any further in *New Jersey v. Delaware II* because Article VIII makes clear that the Compact was not intended to affect or resolve the States' territorial boundary within the River. *See id.* at 378. Thus, the Court concluded that the Compact had no bearing on determining the States' respective ownership claims in the River and its subaqueous soil.

For present purposes it is not necessary to recount the entirety of the Court's historical review of Delaware's claims to the twelve-mile circle. *See id.* at 364-78. Suffice it to say that the Court conclusively held that "[w]ithin the twelve-mile circle, the river and the subaqueous soil thereof up to low water mark on the easterly or New Jersey side will be adjudged to belong to the state of Delaware, subject to the Compact of 1905." *Id.* at 378, 385.

With regard to the disputed boundary below the twelve-mile circle, the Court held that "the true boundary between the [States] will be adjudged to be the middle of the main ship channel in Delaware river and bay." *Id.* at 378. This holding is not in dispute in this action.

The Court entered a Decree on June 3, 1935, setting the precise boundary. *See New Jersey v. Delaware II*, 295 U.S. 694 (1935). Again, the Decree was "made without prejudice to the rights of either state, or the rights of those claiming under either of said states, by virtue of the compact of 1905 between said states." *Id.* at 699.

Thus, since 1934 the location of the boundary between New Jersey and Delaware has no longer been in dispute. Within the twelve-mile circle, Delaware owns title to the River and subaqueous soil up to the low water mark on the New Jersey side of the River, "subject to the Compact of

1905." *New Jersey v. Delaware II*, 291 U.S. at 385. Each of six municipalities in New Jersey has one boundary all or partially at the low water mark of the River within the twelve-mile circle, thus bordering directly on Delaware's territory: Logan Township in Gloucester County; and Oldmans Township, Penns Grove Borough, Carneys Point Township, Pennsville Township and Elsinboro Township, all within Salem County.[12]

Nearly three years later, in May 1938, New Jersey sought leave to file a petition for rehearing of the Court's decision. The Court granted the motion for leave to submit the petition but denied the petition for rehearing summarily. *New Jersey v. Delaware II*, 304 U.S. 590 (1938). In December 1938, New Jersey filed another motion for leave to file a second petition for rehearing; the Court denied the motion. *New Jersey v. Delaware II*, 305 U.S. 576 (1938).

IV. The Present Controversy.

Not surprisingly, given the long history of boundary and jurisdictional disputes along their common border, New Jersey and Delaware again find themselves embroiled in a dispute over their rights on (and under) the River. In the decades following this Court's decision in *New Jersey v. Delaware II*, both States engaged in a series of activities – through regulatory actions, grants and leases – on the New Jersey side of the River. Of relevance in the present dispute, New Jersey objects to Delaware's attempts to regulate a proposed development on the New Jersey side of the River.

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[12] Affidavit of Richard Castagna ("Castagna Aff.") ¶ 10 (NJA 383a).

New Jersey points to the fact that, until the 1970s, Delaware made few, if any, attempts to regulate matters on the eastern shore of the River. Moreover, New Jersey asserts that, during those same years, it continued issuing various grants and leases of riparian lands and otherwise regulating riparian improvements on its own shore.[44] From this course of conduct, New Jersey argues that Delaware's recent interference on the eastern shore of the River is contrary to the States' intentions when they adopted the Compact.

Delaware, in turn, points to its enactment of various statutes in the 1970s and 1980s designed to protect Delaware's coastal waters and lands. It asserts that, because it holds title up to the low water mark on the New Jersey shore, its jurisdiction under those acts reaches to the New Jersey side of the River.[45] New Jersey counters

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[44] A table summarizing various actions taken by both States relating to riparian improvements and regulations along the River is attached hereto as Appendix I.

[45] For instance, in 1971, Delaware adopted the Delaware Coastal Zone Act, 58 Del. Laws ch. 175 (1971), codified at Del. Code Ann. tit. 7, §§ 7001-7013 (the "DCZA"). The DCZA seeks, in broad terms, "to control the location, extent and type of industrial development in Delaware's coastal areas." Del. Code Ann. tit. 7, § 7001. The DCZA further provides that "offshore bulk product transfer facilities represent a significant danger of pollution to the coastal zone and generate pressure for the construction of industrial plants in the coastal zone, which construction is declared to be against public policy." *Id.* Under the statute, "control of industrial development other than that of heavy industry in the coastal zone of Delaware" occurs "through a permit system" overseen by the State Department of Natural Resources and Environmental Control ("DNREC"). *Id.*; *see also* Del. Code Ann. tit. 7, § 7004.

Delaware also adopted the Subaqueous Lands Act in 1986, 65 Del. Laws ch. 508 (1986), codified at Del. Code Ann. tit. 7, §§ 7201-7217 (the "DSLA"). The DSLA provides in part that no person "shall deposit material upon or remove or extract materials from, or construct, modify,

(Continued on following page)

that Delaware has applied these laws to several projects on New Jersey's shore without jurisdiction to do so.

The States managed to coexist for years in spite of the ongoing dispute over the scope of Delaware's jurisdiction to apply and enforce its own laws with respect to development outwards from the New Jersey shore. However, the simmering dispute came to a boil in 2005 when Delaware denied various permits for one particular project on New Jersey's shore, leading to the present action.

The project is construction of a liquefied natural gas ("LNG") facility to be operated by Crown Landing, LLC, a wholly owned indirect subsidiary of British Petroleum ("BP").[46] The proposed Crown Landing facility would include an LNG plant and storage facility, and other structures in New Jersey and a pier and related structures that extend into Delaware.[47] The portion of the proposed Crown Landing facility to be located in Delaware would include an LNG transfer system installed on the unloading platform in the River to transfer the LNG from ships to three 150,000-cubic-meter storage tanks located in New Jersey.[48] Construction of the Crown Landing facility would require the dredging of 1.24 million cubic yards of

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repair or reconstruct, or occupy any structure or facility upon submerged lands or tidelands without first having obtained a permit, lease or letter of approval" from the DNREC. Del. Code Ann. tit. 7, § 7205.

[46] Joint Statement of Facts ("JSF") ¶ 150, attached hereto as Appendix C.

[47] *Id.* ¶ 151.

[48] *Id.* ¶ 152.

subaqueous soil, affecting approximately 29 acres of the bed of the River within Delaware's territory.[49]

On September 27, 2004, Crown Landing, LLC requested permission from DNREC's Wetlands and Subaqueous Lands Section to drill geotechnical test borings in the River.[50] On December 7, 2004, BP applied to DNREC for a status determination under the DCZA for the proposed Crown Landing project.[51] On January 7, 2005 – over three months after beginning the Delaware approval process – BP commenced the permit process in New Jersey, as well, by filing a Waterfront Development Application with NJDEP's Office of Dredging and Sediment Technology, presumably in light of the fact that the structure would be built on both New Jersey's and Delaware's lands.[52] On February 3, 2005, DNREC issued a status decision that the proposed Crown Landing project was a prohibited "offshore bulk transfer facility" as well as a prohibited "heavy industry use" under the DCZA.[53]

On February 15, 2005, BP, on behalf of Crown Landing, LLC, filed an administrative appeal to the Delaware Coastal Zone Industrial Control Board ("CZICB").[54] On April 14, 2005, the CZICB affirmed DNREC's status decision that BP's Crown Landing project was a bulk product transfer facility prohibited under the DCZA.[55]

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[49] *Id.* ¶ 153.

[50] *Id.* ¶ 150.

[51] *Id.* ¶ 154.

[52] *Id.* ¶ 155.

[53] *Id.* ¶ 156.

[54] *Id.* ¶ 157.

[55] *Id.* ¶ 158.

Thus, Delaware has declined to issue any permits under the DCZA for the proposed project. BP did not appeal the CZICB's decision, thereby rendering it a final determination.[56] Therefore, if Delaware is correct in its assertion that it has regulatory jurisdiction over projects extending from the New Jersey shore outshore of the low water mark, BP and Crown Landing, LLC will be precluded from constructing the proposed LNG facility.

Following Delaware's refusal to grant the requested permits to Crown Landing, LLC, the States engaged in a series of correspondence. New Jersey considered a range of legislative resolutions and threats to withdraw state pension funds from Delaware banks. Delaware considered legislation authorizing the National Guard to step in to protect Delaware's borders from encroachment. And one New Jersey legislator even explored the seaworthiness of the decommissioned battleship New Jersey, currently docked as a museum on the Camden waterfront, in the event the State was forced to repel an armed invasion by Delaware.[57] Despite – or perhaps because of – these diverse responses to the current dispute, the States have been unable to break their impasse.

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[56] *Id.*

[57] New Jersey's Motion to Reopen and for Supplemental Decree at 16-17 and accompanying Appendix at 155a-164a, 266a-268a; *see also* NJA 1109a-1116a; Press Release of New Jersey Assemblyman John Burzichelli, dated January 20, 2006, found at http://politics.nexcess.net/pressrelease/2006/01/assemblyman_john_burzichelli_2.html (last viewed April 5, 2007).

PROCEEDINGS BEFORE THE COURT IN THIS ACTION

New Jersey commenced this action on July 28, 2005, by filing with the Court a Motion to Reopen and for a Supplemental Decree. New Jersey sought leave to file a petition to reopen *New Jersey v. Delaware II*, to obtain a supplemental decree enforcing New Jersey's alleged riparian rights and jurisdiction under Article VII of the Compact. New Jersey sought a declaration that Article VII gives New Jersey exclusive riparian jurisdiction over improvements extending outshore of the low water mark on New Jersey's shore. New Jersey further sought to have Delaware enjoined from asserting jurisdiction over such improvements.[58] Alternatively, New Jersey sought leave to file a new Bill of Complaint.[59]

In essence, New Jersey argued that under Article VII of the Compact it has exclusive jurisdiction over projects appurtenant to its shores. It maintained that Delaware is without jurisdiction to regulate projects such as the proposed Crown Landing LNG facility to be built on and outward from the New Jersey shore. New Jersey therefore asked that the Court "declare that Article VII of the Compact of 1905 grants New Jersey riparian jurisdiction to regulate the construction of improvements appurtenant to the New Jersey shore of the River within the Twelve-Mile Circle, free of regulation by Delaware." It asked that the Court "enjoin Delaware from interfering with the exercise of New Jersey's riparian jurisdiction."[60]

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[58] *Id.* at 1-2.

[59] *Id.* at 34.

[60] *Id.* at 35.

Delaware opposed New Jersey's motion on several grounds. Delaware argued that the Court "lacks jurisdiction over this dispute, which in reality is between BP and Delaware, not two States."[61] Further, Delaware argued on the merits that New Jersey's reading of Article VII is incorrect, because New Jersey does not have exclusive jurisdiction to "approve projects that encroach on Delaware submerged lands without any say by Delaware."[62]

In the alternative, Delaware asked the Court to appoint a Special Master to take evidence on, among other things, "each State's riparian rights within the twelve-mile circle prior to the 1905 Compact, the intent of each State in signing the Compact with respect to riparian rights, and the course of performance during the 100 years since the Compact was approved."[63] Delaware sought the appointment of a Special Master to "ensure that Delaware's right to pursue discovery on these complex, historical issues is protected."[64] Substantively, Delaware asked the Court to "dismiss New Jersey's pleading for lack of jurisdiction."[65] Alternatively, Delaware asked the Court to "deny New Jersey's request for declaratory and injunctive relief because Delaware has the right, as a sovereign and under the 1905 Compact, to regulate the manner in which BP intends to construct a massive LNG bulk product transfer facility within Delaware's territory."[66]

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[61] Delaware's Opposition to New Jersey's Motion to Reopen and for Supplemental Decree at 21.

[62] *Id.*

[63] *Id.* at 22.

[64] *Id.*

[65] *Id.* at 78.

[66] *Id.*

By Order dated November 28, 2005, the Court denied New Jersey's Motion to Reopen and for a Supplemental Decree. It granted New Jersey's alternative request for leave to file a Bill of Complaint. The Court further ordered Delaware to file an answer within 30 days, docketing the new proceeding as No. 134, Original. *See New Jersey v. Delaware*, 126 S. Ct. 713 (2005). Delaware answered the Bill of Complaint on December 28, 2005. In its Answer, Delaware included a prayer for relief, asking the Court to enter judgment "[d]eclaring that Delaware has the right . . . to enforce its laws, including its coastal zone, environmental protection, and natural resources statutes," and is entitled to "enforcement of its laws as they apply to proposals to construct bulk transfer facilities and/or heavy industry, or otherwise to use or to disturb the subaqueous soil within Delaware's coastal zone."[67] Delaware further requested that the Court enter judgment "[e]njoining New Jersey . . . from interfering with the rights of Delaware of, in or over the Delaware River within the twelve-mile circle, including without limitation the subaqueous soil thereof."[68]

Delaware also formally moved for appointment of a Special Master.[69] By Order dated January 23, 2006, the Court granted Delaware's motion and appointed the undersigned as Special Master. *See New Jersey v. Delaware*, 126 S. Ct. 1184 (2006).

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[67] Delaware's Answer at 12.

[68] *Id.*

[69] Delaware's Motion for Appointment of Special Master.

PROCEEDINGS BEFORE THE SPECIAL MASTER IN THIS ACTION

I. Preliminary Issues.

Before the principal issues for decision in this case were framed, the parties filed several preliminary motions.[70] With one exception, those motions dealt with scheduling and other ministerial matters. The only substantive motion addressed the scope of the factual issues to be explored by the States in discovery.

Case Management Order No. 1 directed the States to submit lists of the issues they foresaw as appropriate for resolution by the Special Master. New Jersey was given leave to file a motion addressing the relevance and/or admissibility of the issues identified by Delaware. New Jersey filed such a motion, seeking to strike several of the proposed issues of fact identified by Delaware. Delaware had identified, as a factual issue to be explored through discovery, the relationship between BP's commercial interests in obtaining regulatory approval for the Crown Landing project and New Jersey's decision to file this original action. Delaware's theory was that, depending on whether or to what degree BP influenced New Jersey's decision to file, BP might be deemed the real party in interest, rather than New Jersey, such that this Court might lack original jurisdiction.

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[70] A copy of the Docket of Proceedings Before the Special Master is attached hereto as Appendix K. The docket and electronic copies of all public filings included therein are accessible on the Internet at http://www.pierceatwood.com/custompagedisplay.asp?Show=2.

By Order dated June 13, 2006, New Jersey's motion was granted in part and denied in part. A copy of that Order is attached at Appendix D. It was granted as to Delaware's attack on the Court's jurisdiction because (i) the Court had implicitly determined that New Jersey is a proper party when it granted New Jersey's motion for leave to file the Bill of Complaint;[71] (ii) the likelihood that this Court had already made that determination was buttressed by the fact that, in response to New Jersey's Petition to Reopen No. 11, Original, Delaware argued that the Court "lacks jurisdiction over this dispute, which in reality is between BP and Delaware, not two states,"[72] and thus the Court must have considered the matter in deciding to grant New Jersey leave to file; and (iii) it is apparent in any event that New Jersey is a real party in interest, regardless of the influence that BP might have had on New Jersey's decision to commence this suit. It therefore was inappropriate for the Special Master to reconsider the Court's implicit finding that BP's alleged role in New Jersey's pursuit of this action was insufficient to defeat the Court's original jurisdiction.[73]

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[71] *See, e.g., Maryland v. Louisiana*, 451 U.S. 725, 740 n.16 (2002) (By "granting plaintiffs' motions for leave to file, we rejected [defendant's] motions that the case should be dismissed," because "[u]sually, when we decline to exercise our original jurisdiction, we do so by denying the motion for leave to file."); *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992) ("Determining whether a case is 'appropriate' for our original jurisdiction involves an examination of . . . 'the nature of the interest of the complaining State. . . .'") (quoting *Massachusetts v. Missouri*, 308 U.S. 1, 18 (1939)).

[72] Delaware's Opposition to New Jersey's Motion to Reopen and for Supplemental Decree at 21.

[73] Delaware also identified as an issue of law to be resolved in this action whether "the failure of the States to enact the uniform fishing

(Continued on following page)

II. Record Before the Special Master.

Under the parameters set forth in the Case Management Plan and pursuant to various Case Management Orders, the parties engaged in discovery spanning about nine months. Following the completion of discovery, in order to frame the legal issues and argue their respective positions, the States presented cross motions for summary judgment and oppositions and replies thereto, as well as evidentiary material supplemental to their briefs. The parties submitted a total of eighteen volumes of historical documents, correspondence, reports and secondary source materials, adding up to nearly 6,500 pages. Indices of those materials, prepared by the States, are provided in Appendices E and F attached hereto.

Following receipt of the summary judgment motions, the parties were instructed to submit proposed forms of judgment specifying in succinct fashion the precise relief sought by each party. In response, New Jersey submitted a proposed decree by which the Court would order that:

> 1. The Compact of 1905 between the State of New Jersey and the State of Delaware grants exclusive State riparian jurisdiction to New Jersey to regulate all aspects of the construction, maintenance and use of improvements appurtenant to the New Jersey shore of the Delaware River within the Twelve Mile Circle that extend

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laws required by Article IV of the 1905 Compact renders the Compact unenforceable." *See* Delaware's Issues of Fact and Law at 3 (Feb. 17, 2006). Delaware has not raised that issue in its pending summary judgment motion, and has stated that it "takes no position in this litigation" on that issue, and therefore appears to have waived any argument that the Compact is unenforceable. Delaware's Opposition to New Jersey's Motion for Summary Judgment at 46 n.42.

outshore of the mean low water line. The Compact also grants New Jersey exclusive State jurisdiction over vessels using or attaching to such improvements.

2. The Compact of 1905 authorizes New Jersey to convey those grants, leases, licenses or other interests in the bed of the Delaware River within the Twelve Mile Circle outshore of the mean low water line that are reasonably related to the exercise of its jurisdiction under paragraph 1.

3. Delaware is enjoined from requiring any permit, license, lease, certification, determination or other authorization for the construction, maintenance or use [of] a riparian improvement appurtenant to the New Jersey shore of the Delaware River within the Twelve Mile Circle.[74]

Delaware submitted a proposed form of judgment by which the Court would order that:

1. New Jersey's request for relief is denied and its complaint is dismissed with prejudice.

2. Under the 1905 Compact and this Court's decision in *New Jersey v. Delaware*, 291 U.S. 361 (1934), New Jersey lacks any jurisdiction within the twelve-mile circle to regulate proposed or existing improvements on Delaware lands, regardless of whether they originate in New Jersey; or to grant, lease, or convey Delaware lands. Accordingly, BP's proposed Crown Landing facility is subject to regulation under the Delaware Coastal Zone Act.

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[74] New Jersey's Proposed Decree, attached hereto as Appendix G. New Jersey's proposal also included provisions for payment of the Special Master's expenses and retention of the Court's jurisdiction.

3. New Jersey is enjoined within the twelve-mile circle from exercising any riparian jurisdiction beyond its border with Delaware and from granting, leasing, or conveying Delaware lands.[75]

Thus, in summary, the States essentially seek mirror-image relief. New Jersey asks the Court to declare that it has exclusive jurisdiction to convey lands and regulate improvements appurtenant to the New Jersey shore beyond the low water mark. Delaware asks the Court to declare that New Jersey lacks jurisdiction either to convey lands or to regulate any improvements appurtenant to the New Jersey shore beyond the low water mark.

Oral argument on the States' cross motions for summary judgment was held in Philadelphia, Pennsylvania on February 22, 2007. With the briefing and oral argument now complete, the issues raised by the parties are ripe for resolution. Accordingly, this Report is now filed with the Court.

ISSUES PRESENTED

The parties both agree that the central issues in this action revolve around the meaning of the 1905 Compact, and in particular, Article VII. The 1934 ruling of this Court in *New Jersey v. Delaware II* declared that Delaware's ownership of the River and its subaqueous soil up to the low water mark on the New Jersey side of the River

[75] Delaware's Proposed Form of Judgment, attached hereto as Appendix H. Like New Jersey's proposal, Delaware's proposed judgment contained additional elements regarding payment of the Special Master's expenses and the Court's retention of jurisdiction.

is subject to the Compact. Therefore, New Jersey's claim to riparian rights and exclusive jurisdiction over improvements appurtenant to that shore is dependent on the language of the Compact itself.

As defined by the arguments put forth by the parties on their summary judgment motions, the issues for the Court to decide are:

1. *The "Riparian Lands Issue."* Whether the Compact preserves for New Jersey the authority to make riparian land grants outshore of the low water mark on its side of the River within the twelve-mile circle.

2. *The "Riparian Rights Issue."* Whether the Compact preserves for New Jersey the authority to grant riparian rights outshore of the low water mark on its side of the River within the twelve-mile circle.

3. *The "Riparian Jurisdiction Issue."* Whether the Compact's preservation of "riparian jurisdiction" of "every kind and nature" authorizes New Jersey to exercise regulatory jurisdiction to the full extent of its police powers outshore of the low water mark on its side of the River within the twelve-mile circle, or instead is confined to a narrower scope of jurisdiction beyond New Jersey's sovereign territory. And, regardless of the scope of "riparian jurisdiction" preserved for New Jersey within the twelve-mile circle, whether that jurisdiction is exclusive of any claim of jurisdiction by Delaware.

4. *The "Estoppel Issue."* Whether, if the Compact does not explicitly preserve to New Jersey exclusive jurisdiction of every kind and

nature over riparian projects, such as the Crown Landing project, constructed on the New Jersey shore but extending outshore of the low water mark on the River within the twelve-mile circle, Delaware nonetheless should be judicially estopped from challenging New Jersey's claim of exclusive jurisdiction.

5. *The "Prescription Issue."* Whether, regardless of the meaning of the Compact, New Jersey, through the doctrine of prescription and acquiescence, has acquired the exclusive authority to grant riparian lands and rights and to exercise jurisdiction of every kind and nature related to projects, such as the Crown Landing project, constructed on the New Jersey shore but extending outshore of the low water mark on the River within the twelve-mile circle.

For convenience, the balance of this Report will refer to each of these issues by the shorthand titles used above.

For the reasons stated below, the Compact does preserve for New Jersey riparian rights and riparian jurisdiction, so that New Jersey may authorize the exercise of riparian rights, such as the construction of wharves associated with the Crown Landing project, appurtenant to its shore and extending beyond the low water mark. However, New Jersey's authority to make riparian land grants applies only inshore of the State boundary at the low water mark.

Furthermore, New Jersey's authority to exercise jurisdiction outshore of the low water mark is limited to jurisdiction over riparian rights, rather than complete regulatory jurisdiction under New Jersey's full police

powers. Moreover, the riparian jurisdiction preserved to New Jersey on its own side of the River outshore of the low water mark is not exclusive under the Compact; therefore Delaware also has overlapping jurisdiction to regulate, under its full police powers, improvements outshore of the low water mark on the New Jersey side of the River.

In addition, Delaware is not estopped from challenging New Jersey's claim of exclusive jurisdiction in this action. Finally, New Jersey's arguments that it has acquired exclusive jurisdiction through prescription and acquiescence are not persuasive.

Therefore, this Report recommends that the Court enter declaratory judgment consistent with the foregoing findings and otherwise deny the motions for summary judgment of both States.[76]

ANALYSIS

Resolution of the first three issues – the Riparian Lands Issue, the Riparian Rights Issue and the Riparian Jurisdiction Issue – depends upon the meaning of Article VII of the Compact. That interpretation must take into account the parties' contemporaneous understanding in

[76] The injunctive relief requested by the parties is unwarranted, because presumably each State will abide by the Court's ruling and entry of declaratory relief. *See, e.g., Texas v. Florida*, 306 U.S. 398, 411 (1939) ("While in most causes in equity the principal relief sought is that afforded by injunction, there are others in which the irreparable injury which is the indispensable basis for the exercise of equity powers is prevented by a mere adjudication of rights which is binding on the parties. This has long been the settled practice of this Court in cases of boundary disputes between states.").

1905 and the parties' course of conduct after ratification of the Compact. Therefore, the Report first considers what impact the Compact has on resolving those issues in the context of the pertinent documents and this Court's prior decision in *New Jersey v. Delaware II*. The Report then considers the evidence offered by the parties in support of their respective positions on the Estoppel and Prescription Issues raised by New Jersey.

I. The Riparian Lands and Riparian Rights Issues.

New Jersey's authority to grant[77] riparian *lands* necessarily is limited by the boundary set in *New Jersey v. Delaware II*. However, New Jersey retains authority to grant riparian *rights* appurtenant to its own shore under Article VII of the Compact, regardless of the location of the boundary. That authority was not eliminated by this Court's resolution of the boundary dispute in *New Jersey v. Delaware II*. The difference stems from the fact that a State's authority to make land grants ordinarily is limited to those lands for which it holds title. Nothing in the Compact changes that result. Riparian rights, on the other hand, commonly extend over, and may be exercised on, land not owned by the riparian owner. Thus, the fact that Delaware holds title to the River outshore of the low water mark does not impact New Jersey's ability as a riparian owner to construct riparian improvements, or to authorize

[77] Article VII provides that the States may make "grants, leases, and conveyances of riparian lands and rights." As shorthand, this Report refers to that authority collectively as the authority to "grant" riparian lands and rights, because the scope of the States' authority under Article VII does not appear to differ depending on which of those three methods is used to transfer riparian lands or rights.

others to construct such improvements, outshore of the low water mark to the navigable portions of the River.

A. Delaware's Ownership Up to the Low Water Mark on the New Jersey Side of the Delaware River.

The present action does not involve a dispute over the boundary between New Jersey and Delaware. This Court resolved the location of the boundary more than 70 years ago. "Within the twelve-mile circle, the river and the subaqueous soil thereof up to low water mark on the easterly or New Jersey side will be adjudged to belong to the state of Delaware, subject to the Compact of 1905." *New Jersey v. Delaware II*, 291 U.S. at 385. Thus, New Jersey cannot – and does not – dispute Delaware's ownership of the River up to the low water mark.

Because Delaware owns the land and water up to the low water mark, the starting presumption is that Delaware, as the sovereign State, has jurisdiction over its own land. As this Court has held, a sovereign State ordinarily has jurisdiction up to the limits of its own boundaries, but no farther. *See United States v. Alaska*, 521 U.S. 1, 5 (1997) ("Ownership of submerged lands – which carries with it power to control navigation, fishing, and other public uses of water – is an essential attribute of sovereignty."); *Henderson Bridge Co. v. City of Henderson*, 173 U.S. 592, 622 (1899) (holding that Indiana could not tax the portion of a bridge structure beyond the boundary and situated on territory owned by Kentucky). "It follows, that when a place is within the boundary, it is a part of the territory of a state; title, jurisdiction, and sovereignty, are inseparable incidents, and remain so till the state makes

some cession." *Rhode Island v. Massachusetts*, 37 U.S. 657, 733 (1838).

Accordingly, absent any interstate agreement to the contrary, Delaware is entitled to the exclusive authority – as against a sister State – to regulate matters occurring within its territory. In this case, any limitation on Delaware's right to regulate or control matters occurring below the low water mark must be found in the Compact. Any limitation exists because the Court's resolution of the location of the common River boundary was expressly made "subject to the Compact of 1905." *See New Jersey v. Delaware II*, 291 U.S. at 385. The analysis therefore necessarily turns on what authority, if any, the Compact provides for New Jersey to exercise jurisdiction outshore of the low water mark of the River that could override the presumption in favor of Delaware's authority over such lands.

B. The Impact of the Boundary Resolution on the Authority of Each State Under the Compact.

Article VII of the Compact provides that "Each State may, *on its own side of the river*, continue[78] to exercise riparian jurisdiction of every kind and nature, and to make grants, leases, and conveyances of riparian lands and rights under the laws of the respective States."[79]

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[78] Contemporaneously with the Compact's adoption, the verb "continue" was defined in part to mean to "protract or extend in duration; to persevere or persist in; to cease not." Webster's International Dictionary of the English Language at 314 (1898) (DA 4195).

[79] Compact Art. VII (emphasis added), App. B-5.

Delaware argues that the phrase "its own side of the river" should be read with reference to each State's boundary. In other words, Delaware argues that – because this Court, 29 years after the Compact, determined that Delaware owns the entire River up to the low water mark on the eastern shore – the entire River is on Delaware's "own side," and New Jersey consequently has no "side" of the River on which to exercise any riparian rights or riparian jurisdiction. To state that argument is to show its fallacies.

The interpretation of Article VII is a question of law. The Compact is both a contract and, upon ratification by Congress, the equivalent of a federal statute. Therefore, ordinary principles of contract and statutory construction govern its interpretation. *See Virginia v. Maryland*, 540 U.S. 56, 66 (2003) ("We interpret a congressionally approved interstate compact [j]ust as if [we] were addressing a federal statute.") (internal quotation marks omitted); *see also New Jersey v. New York*, 523 U.S. 767, 811 (1998); *Texas v. New Mexico*, 482 U.S. 124, 128 (1987). Under the rules of statutory construction, Delaware's position that New Jersey no longer has the authority to exercise riparian jurisdiction or make grants of riparian rights is unpersuasive for at least six reasons.

First, Delaware's construction of "its own side of the river" defies common sense. Even after *New Jersey v. Delaware II*, New Jersey still owns down to the easterly low water mark. *See New Jersey v. Delaware II*, 291 U.S. at 385. As this Court noted, in defining the boundaries, Delaware owns up to the "New Jersey side" of the River. So New Jersey still has a side. *Id.*

Second, nothing in the Compact makes New Jersey's ability to continue exercising whatever rights and jurisdiction

were confirmed in Article VII contingent on New Jersey's actual ownership of a portion of the River westerly of the boundary. Indeed, the historical evidence presented by the parties shows that New Jersey had maintained, from its formation as a State, that "as a result of the American Revolution, that portion of the Delaware River lying between the thalweg of the Delaware River and the high water mark on the easterly shore within the twelve-mile circle became and remained vested in fee simple in New Jersey."[80] New Jersey had a long history of making land grants along its shore, setting boundaries, adopting pierhead and bulkhead lines, and the like.[81] Had the States intended that the resolution of the boundary render Article VII void, they would have said so in clearer terms.

Third, Delaware's attempt to parse through the other Articles in the Compact to try to craft an argument that Article VII's reference to "own side of the river" was used by the drafters as a proxy to mean "only if each state owns to the middle of the river" is similarly unpersuasive. Delaware's comparison of Article VII with the other provisions of the Compact cannot change the fact that New Jersey continues to have a "side of the river" under any rational interpretation of that term.[82]

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[80] JSF ¶ 2.

[81] *See* Appendix I. In addition, Mr. Castagna has attached several maps to his affidavit and report showing the locations of wharves constructed on New Jersey's shore. *See* Castagna Aff. (NJA 369a); Report of Richard Castagna ("Castagna Rep.") (NJA 1193a); JSF ¶¶ 10, 15-16, 18-20, 32.

[82] Delaware also cites to the 1898 edition of Webster's Dictionary, that defines "side" to mean the "margin, edge, verge, or border of a surface . . . as, the side . . . of a river." (DA 4199). Again, New Jersey does retain not only an "edge" or "border" along the River even after

(Continued on following page)

Fourth, in filings in *New Jersey v. Delaware II*, Delaware characterized the States' boundary within the twelve-mile circle as the "low water mark on the New Jersey shore."[83] If New Jersey owns the "shore," surely it also has its own "side."

Fifth, relevant historical documents show that Delaware recognized that New Jersey continues to have certain authority under Article VII even after the resolution of the boundary dispute.[84]

Sixth, Delaware's construction of "its own side of the river" effectively would render Article VII meaningless. Delaware's assertion that Article VII contains an implied time limit, rendering it void upon this Court's establishment of the boundary in *New Jersey v. Delaware II*, is belied by the language of Article IX, *i.e.*, that the Compact is "binding in perpetuity upon both of said states."[85] Delaware's interpretation flies in the face of ordinary principles of statutory construction that preclude interpreting language in a manner

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New Jersey v. Delaware II, but also a portion of the River itself, between the low and high water marks. Thus, New Jersey has a "side" of the River according to the common definition set forth in the contemporary edition of Webster's, as well.

[83] Delaware's Reply Brief to this Court in *New Jersey v. Delaware II* at 17 (NJA 140a).

[84] *See* Letter from Clarence Southerland to Percy Warren Green, Delaware Attorney General, dated July 3, 1935 (stating that "the State of Delaware will be justified in contending that the compact does nothing more than recognize what had already been recognized by the State of Delaware, namely, *the right of owners of the upland on the New Jersey shore to wharf out to deep water, and that, in any event, the compact cannot be construed as doing more than ceding to New Jersey a certain limited amount of jurisdiction over riparian matters*") (emphasis added) (NJA 200a).

[85] Compact Art. IX, App. B-5.

that renders it devoid of meaning. *See, e.g., New York State Blue Cross Plans v. Travelers Ins.*, 514 U.S. 645, 667 (1995); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 216 (1995).

Delaware points to a joint submission prepared by Delaware's counsel and submitted to this Court in *New Jersey v. Delaware I*. Delaware's counsel summarily stated that the Compact was "not a settlement of the disputed boundary, but a truce or *modus vivendi*."[86] Delaware thus attempted to show that the States' rights under Article VII were entirely temporary and contingent on the ultimate resolution of the boundary. That position is inconsistent with Delaware's representations to the Court in *New Jersey v. Delaware II* on the continuing vitality of the Compact. Moreover, it is clear from the joint submission in *New Jersey v. Delaware I* that Delaware's counsel was referring to the Compact as a "truce or *modus vivendi*" only in connection with the still unresolved boundary dispute that obviously had not been addressed in the Compact, rather than as a representation that the entire Compact was intended merely as a temporary measure.[87]

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[86] Statement of Reasons Submitted Orally for the Joint Application of Counsel on Both Sides for Suspension of Proceedings Until the Further Order of the Court in *New Jersey v. Delaware I* (DA 190).

[87] Delaware's own expert witness on riparian law, Joseph L. Sax, appears to distance himself from Delaware's interpretation of "own side of the river." Although Mr. Sax opines on the likely meaning of "riparian rights" and "riparian jurisdiction" set forth in Article VII, he conspicuously declines to offer any opinion on "the meaning of the Article VII phrase 'own side of the river.'" Report of Joseph L. Sax ("Sax Report") at 7 n.14 (DA 4129). At the very least Delaware's proffered riparian expert provides no support for Delaware's strained interpretation.

New Jersey has objected to the admissibility of the Sax Report. There is no need to address that objection because his opinions would not materially affect the conclusions here reached.

New Jersey continues to have "its own side of the river." The focus then turns to what authority New Jersey retains under the Compact to make grants of riparian lands and rights, and to exercise riparian jurisdiction, on that side of the River.

C. Riparian Lands: New Jersey's Authority to Make Grants, Leases, and Conveyances of Riparian Lands on the Eastern Side of the River.

Article VII reserves to both States the right to "make grants, leases, and conveyances of riparian lands and rights under the laws of the respective States."[88] This Report first addresses the authority New Jersey possesses over riparian *lands*, leaving discussion of its authority in regard to riparian *rights* to the following Section D.

The term "riparian land" typically is defined to mean "a tract of land that borders on a watercourse or lake, whether or not it includes a part of the bed of the watercourse or lake." Restatement (Second) of Torts § 843.[89] Land need not actually be covered by the waters of a river to be considered riparian, as long as it touches upon or is adjacent to the water. *See* 1 Henry P. Farnham, Water and

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[88] Compact Art. VII, App. B-5.

[89] *See also* Restatement (Second) of Torts § 843, cmt. e ("Riparian land may include all or part of the bed or may only border upon the water if the bed is owned by another person or the public."). Contemporaneously with the adoption of the Compact in 1905, the term "riparian" was defined to mean, "Of or pertaining to the bank of a river." Webster's Int'l Dictionary of the English Language (1898) (NJA 1318a). That definition is consistent with the definition contained in the more recent Restatement.

Water Rights § 63 at 281 (1904) (hereinafter "Farnham") ("The rights attached to riparian ownership are not affected by the character of the water and depend upon lateral contact with the water, and not upon ownership of the soil under water.").[90]

Thus, the "riparian lands" that New Jersey may grant encompass the banks and lands adjacent to the River, as well as any land underneath the River, to the extent New Jersey owns such land. Indeed, New Jersey would, even without the Compact, remain as the sovereign owner of that land down to the low water mark.

The question remains whether the Compact continues to bestow upon New Jersey the authority to make grants of riparian lands outshore of the low water mark. New Jersey has not advanced any convincing argument that the drafters of the Compact intended by Article VII to permit one State to make grants of riparian land actually owned by the other State. In historical documents, New Jersey has conceded that the Compact "gave the State of New Jersey no proprietary rights in the soil within the twelve-mile circle," and "New Jersey has no ownership in the soil offshore of said low-water mark."[91] Similarly, New Jersey previously has recognized that the "lands below low

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[90] *See also City of Paterson v. East Jersey Water Co.*, 70 A. 472, 479 (N.J. Ch. 1908) ("Riparian lands, in the language of the cases and treatises, include by nature as well the lands over as those along which the stream flows, and riparian rights are incident to lands on the bank, as well as those forming the bed of the stream."); 2 Farnham § 463a at 1572 ("The most satisfactory rule is that the parcels of land should be regarded as riparian so far as their location with reference to the stream has indicated where their boundary should be fixed. . . .").

[91] New Jersey Attorney General, Formal Opinion No. 22, dated Nov. 16, 1956, at 116, 122 (NJA 308a).

water mark within the twelve-mile Circle are not the lands of this State, but lands of the State of Delaware," and therefore that New Jersey was not authorized to issue licenses and collect fees for "the dredging of bottom material below low water mark."[92] Those views follow naturally from the fact that the boundary between the States is set at the low water mark, so Delaware owns title to the soil westerly of the low water mark on the New Jersey shore.

As the sovereign holding title outshore of the low water mark, Delaware, not New Jersey, has the right to make any "grants, leases and conveyances" of such land. Typically, inquiry into the scope of an intrusion on the "'title to the bed of navigable water must . . . begin with a strong presumption' against defeat of a State's title." *United States v. Alaska*, 521 U.S. at 34 (quoting *Montana*

[92] New Jersey Attorney General, Formal Opinion No. 3, dated Feb. 2, 1954, at 8 (NJA 302a). In the same opinion, the Attorney General concluded that – despite the fact that it did not permit New Jersey to dredge lands beyond the low water mark – the Compact should be read to permit New Jersey to make riparian grants of land outshore of the low water mark. In other words, the Attorney General concluded that the Compact should be read to permit New Jersey to make conveyances of the same Delaware land that New Jersey admittedly could not dredge. He did not explain the logic of one State conveying property titled in another State. In any event, those two conclusions appear to be fundamentally inconsistent with one another. One would assume that, if New Jersey were permitted to convey land owned by Delaware to private parties, and thus divest Delaware of its title in those lands, it likewise could permit those private parties to dredge soil on the land it conveyed to them. Moreover, the latter conclusion was based in part on the practical view that, if a riparian owner had to obtain grants from both States, such owner would have to undergo a "cumbersome procedure." *Id.* Cumbersome though it might be, as discussed below, that alone does not warrant reading Article VII in such a way that it deprives Delaware of its sovereign rights, any more than the Court should adopt Delaware's interpretation of Article VII that effectively would deprive New Jersey of all its rights.

v. United States, 450 U.S. 544, 552 (1981)). Likewise, "a waiver of sovereign authority will not be implied, but instead must be surrendered in unmistakable terms." *United States v. Cherokee Nation*, 480 U.S. 700, 707 (1987); *see Massachusetts v. New York*, 271 U.S. 65, 89 (1926); *United States v. Texas*, 162 U.S. 1, 68 (1896).

Consistent with those canons, Article VIII in the Compact provides, "Nothing herein contained shall affect the territorial limits, rights, or jurisdiction of either State of, in, or over the Delaware River, or the ownership of the subaqueous soil thereof, except as herein expressly set forth."[93] Thus, any waiver of Delaware's sovereign claim to title in lands outshore of the low water mark must be express. Although Article VII permits New Jersey to continue making grants of riparian lands on "its own side of the river," that provision does not expressly state that the States intended that New Jersey could make grants of land owned by another sovereign State. On the contrary, Article VII just as easily can be read to mean that New Jersey continues to have the power to make grants of the foreshore that it continues to own, *i.e.*, the area between the high and low water marks on the eastern shore of the River. Historically, New Jersey had done so by virtue of its ownership of the foreshore, in contrast to the law in Delaware that recognized title in riparian land owners down to the low water mark on its shore. In any event, Article VII does not expressly state that Delaware was waiving any claim to title in lands. And by the direction of Article VIII, because New Jersey's interpretation is not

[93] Compact Art. VIII, App. B-5.

supported by express language in Article VII, it should be rejected.

The States entered into the Compact in the face of their then-unresolved boundary dispute. As of 1905, New Jersey claimed title to the middle of the channel, and Delaware claimed title up to the low water mark. The Compact did not address that boundary question. Rather, it left it to be resolved another day. In the context of that setting, it is improbable that Delaware would have implicitly agreed to waive or cede any potential property rights it might have in the water and subaqueous soil between the shipping channel and the low water mark, once the boundary was eventually settled, without using explicit language to that effect. In addition, New Jersey would have insisted upon express language bestowing upon it the authority to make riparian land grants regardless of where the boundary was to be located, to avoid the precise type of dispute in which the States are today embroiled.

Finally, if Article VII of the Compact resulted in a waiver by Delaware of any authority to exercise and enforce its property rights on and under the River up to the low water mark, this Court would have resolved *New Jersey v. Delaware II* differently. In advancing its argument that it held title up to the middle of the shipping channel, New Jersey argued that "by this compact the controversy was set to rest and the claim of Delaware abandoned." *New Jersey v. Delaware II*, 291 U.S. at 377. This Court concluded that New Jersey's argument was "wholly without force," at least in part because of the language in Article VIII disclaiming any intent to affect the territorial rights or jurisdiction of either State in the River or subaqueous soil. *Id.* at 377-78. This Court thus rejected the argument New Jersey makes now, *i.e.*, that

the Compact somehow bestowed property rights on New Jersey beyond the low water mark. Had the Court accepted New Jersey's argument that Delaware had waived or abandoned its claim of sovereignty to the low water mark on the New Jersey shore, the boundary would not be where it is today.

New Jersey does not dispute Delaware's ownership of the land up to the low water mark. Yet, under New Jersey's theory, New Jersey could continually grant away from Delaware title to the lands on the eastern half of the River all the way up to the middle of the shipping channel, effectively overriding – with no compensation – this Court's careful determination of the location of the boundary at the low water mark. At oral argument, New Jersey asserted that it has the authority to grant title to subaqueous lands west of the low water mark simply because this Court's 1935 Decree made the location of the boundary "subject to the Compact of 1905" assumes that this Court implicitly gave New Jersey the right to transfer title to lands that the Court had just concluded belonged to Delaware. Had this Court intended such a result, it would have stated New Jersey's power in express terms, rather than by allusion.

The language of Article VII, when viewed in connection with Article VIII and in the context of the ongoing boundary dispute that still existed long after adoption of the Compact, does not amount to an express, advance waiver by Delaware of the sovereign rights over the water and soil up to the low water mark that this Court in *New Jersey v. Delaware II* ultimately found it to possess. Therefore, the fact that New Jersey owns only to the low water mark on its side of the River limits the extent of its authority to grant any "riparian lands." Now that the

border has been set at the low water mark of the River on its shore, New Jersey may continue to grant any lands on the banks of the River down to the low water mark; but any lands underneath the River westerly of the low water mark belong to Delaware and are outside the scope of New Jersey's authority under Article VII to make "grants, leases or conveyances" of riparian lands.

D. Riparian Rights: New Jersey's Authority to Make Grants, Leases, and Conveyances of Riparian Rights on the Eastern Side of the River.

The conclusion that New Jersey may not make land grants outshore of the low water mark because they belong to Delaware does not end the inquiry. Article VII also provides that the each State may on "its own side of the river" grant "riparian rights," as well as riparian lands. The question then becomes what the term "riparian rights" means in the context of the Compact.

Both States agree that riparian owners traditionally have had authority to exercise and grant riparian rights, including the right to construct wharves and other improvements extending into an adjacent river, even where they do not own the river itself.[31] Delaware's argument that New Jersey effectively lost the right to construct wharves extending outshore of the low water mark because New Jersey no longer has "its own side" of the River is, for the reasons set forth above, without merit. Both states thus still possess that authority. The scope of that

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[31] *See* New Jersey's Brief in Support of Motion for Summary Judgment at 27; Delaware's Motion for Summary Judgment at 52-54.

authority – at least on New Jersey's part – must still be explored.

The scope of "riparian rights" preserved to each State in Article VII is informed by the contemporaneous understanding of "riparian rights" at the time the Compact was ratified. And that contemporaneous understanding of "riparian rights," in turn, will shed light on the intended meaning of the separate preservation of "riparian jurisdiction" also contained in Article VII.

The concept of riparian rights was well established by 1905. As one contemporary leading treatise noted:

> A comprehensive statement of the rights of a riparian owner is that he has a right to have the stream remain in place and flow as nature directs, and to make such use of the flowing water as he can make without materially interfering with the equal rights of the owners above and below him on the stream.

2 Farnham, Water and Water Rights § 461 at 1565 (1904) (hereinafter "Farnham"). A party's riparian rights include a right of access to the water, typically through construction of wharves. "The riparian owner is also entitled to have his contact with the water remain intact. This is what is known as the right of access, and includes the right to erect wharves to reach the navigable portion of the stream." 1 Farnham § 62 at 279.[95] This Court recognized that common understanding of riparian rights in *New Jersey v. Delaware II*.

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[95] "A wharf is a structure on the margin of navigable water, alongside of which vessels are brought for the sake of being conveniently loaded or unloaded." 1 Farnham § 111 at 520.

> The acts of dominion by riparian proprietors are connected with the building of wharves and piers that project into the stream. . . . By the law of waters of many of our states, a law which in that respect has departed from the common law of England, riparian proprietors have very commonly enjoyed the privilege of gaining access to a stream by building wharves and piers, and this though the title to the foreshore or the bed may have been vested in the state.

New Jersey v. Delaware II, 291 U.S. at 375; *see also United States v. River Rouge Improvement Co.*, 269 U.S. 411, 418 (1926) (finding it "well settled" that a riparian owner generally "has, in addition to the rights common to the public a property right, incident to his ownership of the bank, of access from the front of his land to the navigable part of the stream, and when not forbidden by public law may construct landings, wharves or piers for this purpose") (internal citation omitted). As this Court stated roughly fifty years before the States entered into the 1905 Compact:

> Bridge piers and landing places, as well as wharves and permanent piers, are frequently constructed by the riparian proprietor on the shores of navigable rivers, bays, and arms of the sea, as well as on the lakes. . . . Wharves, quays, piers, and landing places, for the loading and unloading of vessels, were constructed in the navigable waters of the Atlantic States by riparian proprietors at a very early period in colonial times; and, in point of fact, the right to build such erections, subject to the limitations before mentioned, has been claimed and exercised by the owner of the adjacent land from the first settlement of the country to the present time.

Dutton v. Strong, 66 U.S. 23, 31-32 (1861). Thus, a riparian owner's right to "wharf out" into an adjacent stream, even where the bed of the river is owned by the State, was long recognized before 1905 and must have been within the contemplation of the drafters of the Compact, many of whom were themselves lawyers.[96]

The fact that New Jersey retains its riparian rights, including the right to construct wharves and other improvements beyond the low water mark, does not mean that its riparian rights are without limitation. Although a riparian landowner has the right to construct a wharf or other improvement to access navigable waters, that right is not absolute. Rather, riparian owners have a right to reasonable access to and use of the adjacent water, subject to appropriate regulation.[97] By the time of the 1905 Compact, this Court had recognized that a riparian owner's exercise of riparian rights was subject to reasonable regulation by the State. *See, e.g., Cummings v. City of Chicago*, 188 U.S. 410, 427 (1903) (upholding municipality's right to regulate construction of improvements on the Calumet river); *Head v. Amoskeag Mfg. Co.*, 113 U.S. 9, 21 (1885) (addressing a statute governing the construction of dams and mills on waterways and the impact on adjoining riparian landowners and holding that it "is within the constitutional power of the legislature" to regulate such

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[96] Delaware's riparian law expert, Mr. Sax, likewise acknowledges "wharfing out" as a common riparian right, describing it as allowing "the riparian landowner to build a structure in the adjacent bottomlands sufficiently far out into the water to allow a ship to navigate to it, so it could load and unload, and its cargo could be transported on the wharf to the shore." Sax Report at 5 (DA 4127).

[97] *Cf.* 2 Farnham § 466 at 1578-79 (defining a riparian owner's "reasonable use" of waters).

riparian property rights). Similarly, Farnham noted in his 1904 treatise that riparian rights "are always subordinate to the public rights, and the state may regulate their exercise in the interest of the public." 1 Farnham § 63 at 284; *see also* 1 Farnham § 113 at 528; *see* 3 Farnham § 873 at 2540.

Historically, the riparian right to construct wharves was limited always by the greater public need to ensure safe and unhindered navigation along the waterway. *See, e.g., United States v. River Rouge Improvement Co.*, 269 U.S. at 419. The right to wharf out similarly is restricted where the construction or operation of the wharf amounts to a public nuisance, although the nuisance analysis also often turns on whether a wharf poses an obstacle to a river's navigability. *See, e.g., Dutton*, 66 U.S. at 31. Particularly in situations where title to the riverbed lies with an entity other than the riparian owner, "the separate ownership may affect the exercise of some riparian rights by the owner of the adjoining upland." Restatement (Second) of Torts § 843 cmt. e.[38]

In light of those well-established principles, both States agree that riparian rights, such as the right to

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[38] Courts in numerous jurisdictions have reached similar conclusions about the limitations on riparian rights. *See, e.g., State v. Knowles-Lombard Co.*, 122 Conn. 263, 188 A. 275, 276 (Conn. 1936); *Ferry Pass Inspectors' & Shippers' Ass'n v. White's River Inspectors' & Shippers' Ass'n*, 48 So. 643, 645 (Fla. 1909); *Obrecht v. National Gypsum Co.*, 105 N.W.2d 143, 151 (Mich. 1960); *State v. Korrer*, 148 N.W. 617, 622 (Minn. 1914); *Trustees, etc., of Town of Brookhaven v. Smith*, 80 N.E. 665, 670 (N.Y. 1907). *Cf. Keyport & Middletown Point Steamboat Co. v. Farmers Transp. Co.*, 18 N.J. Eq. 511, 1866 WL 89, at *5 (Ct. Errors & Appeals 1866) ("Extraordinary, unusual modes of use, no matter how convenient they may be, are not annexed as incidents in law" to the riparian right to wharf out.).

wharf out, are subject to state regulation.[99] Although there is no bright-line rule for what scope of regulation may be permitted – nor does the present dispute between New Jersey and Delaware require resolution of such a question – the point remains that riparian rights, like other rights, are subject to regulation by the State under its police powers.[100]

Therefore, New Jersey's preserved authority under Article VII of the Compact to make grants of "riparian rights," including the right to build wharves or to authorize private landowners on its shores to do the same, is subject to reasonable regulation by the State. The question remains which State is, or which States are, entitled to exercise that oversight on the eastern side of the River. That issue is addressed in Section II below.

Conclusion: The Riparian Lands Issue and the Riparian Rights Issue

The Compact preserves for New Jersey the authority to make grants of riparian *lands* down only to the low water mark on the New Jersey shore. But the Compact preserves for New Jersey the authority to make grants of

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[99] *See* New Jersey's Brief in Support of Motion for Summary Judgment at 29-31; Delaware's Motion for Summary Judgment at 55-56.

[100] "The police power of a state, while not susceptible of definition with circumstantial precision, . . . springs from the obligation of the state to protect its citizens and provide for the safety and good order of society. . . . It is the governmental power of self-protection and permits reasonable regulation of rights and property in particulars essential to the preservation of the community from injury." *Panhandle Eastern P. Line Co. v. State Highway Comm'n*, 294 U.S. 613, 622 (1935); *see Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991) ("The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals, and we have upheld such a basis for legislation.").

riparian *rights* outshore of the low water mark under New Jersey's law of riparian rights, including the right to construct wharves and other improvements extending to navigable waters flowing over subaqueous soil owned by Delaware. Finally, the parties did not intend that each State's authority "on its own side of the river" in Article VII be eliminated entirely once the location of the boundary was resolved by this Court in 1934. Rather, although the location of the boundary impacts the extent of each State's authority under Article VII, both States continue to have certain authority thereunder. I therefore conclude that:

> **New Jersey has the authority to make grants, leases, and conveyances of riparian lands on the New Jersey side of the Delaware River within the twelve-mile circle only down to the low water mark.**
>
> **Consistent with New Jersey's law of riparian rights, New Jersey riparian owners may construct, maintain and use improvements appurtenant to the New Jersey shore extending outshore of the eastern low water mark of the Delaware River within the twelve-mile circle.**

II. The Riparian Jurisdiction Issue.

Within the twelve-mile circle, one sovereign – New Jersey – owns down to the eastern low water mark, and a second sovereign – Delaware – owns from that low water mark all the way across to its own opposite shore. Thus, this situation is unusual in that the two States do not own equal shares of the River forming their common boundary.

Both States agree that *a* State has the authority to regulate riparian improvements extending outward from New Jersey's shore. The only question is *which* State has, or which States have, the authority to do so. For the reasons discussed above, Delaware's contention that it has exclusive jurisdiction to regulate any riparian improvements along New Jersey's shore because New Jersey no longer has "its own side of the river" is unpersuasive. Thus, Article VII's preservation of "riparian jurisdiction" must either give New Jersey exclusive jurisdiction to regulate all aspects of riparian improvements on its shore, or it must recognize overlapping jurisdiction by both States to the extent riparian development straddles the boundary. As set forth below, New Jersey's assertion that it has exclusive jurisdiction to regulate any riparian improvements on the eastern shore of the Delaware River so far as they extend outshore of the low water mark is equally unpersuasive. Thus, analysis compels the conclusion that there is overlapping jurisdiction on the eastern shore of the Delaware River so far as riparian improvements extend outshore of the low water mark onto Delaware's lands.

A. Construing "Riparian Jurisdiction of Every Kind and Nature" in the Context of the Compact as a Whole and Extrinsic Circumstances.

Article VII provides in pertinent part: "Each State may . . . continue to exercise *riparian jurisdiction of every kind and nature.*"[101] New Jersey asserts that the grant of "riparian jurisdiction" should be read broadly to mean that

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[101] Compact Art. VII (emphasis added), App. B-5.

it may exercise full regulatory authority over any riparian improvements on the eastern side of the River to the outer limits of its police powers, regardless of the location of the boundary. Generally speaking, a State may exercise its police powers for "the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals." *Northwestern Fertilizing Co. v. Village of Hyde Park*, 97 U.S. 659, 667 (1878) (internal quotation marks omitted). New Jersey argues that "riparian jurisdiction" is a surrogate for full police power jurisdiction, and that if New Jersey is entitled to exercise full police powers on improvements extending from its shore, Delaware necessarily cannot do the same.

1. The Scope of New Jersey's Riparian Jursidiction.

The Compact does not define what the drafters intended by the term "riparian jurisdiction." Nor have the States pointed to any contemporaneous writings, caselaw or other authority that discuss the concept of "riparian jurisdiction" in any substantive way. It appears to be a concept that was devised by the drafters specifically for Article VII of the Compact.[102] As such, the term is inherently ambiguous.

When construing ambiguous provisions of an interstate compact, it is appropriate to consider extrinsic evidence that helps shed light on the drafters' intentions. *See Oklahoma v. New Mexico*, 501 U.S. 221, 235 n.5 (1991) ("we repeatedly have looked to legislative history and

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[102] *See* Sax Report at 3 (DA 4281) ("The phrase 'riparian jurisdiction' was not then, and is not now, a legal term of art. It is, to the best of my knowledge, found neither in the treatise or article literature, nor in judicial opinions or statutes.").

other extrinsic material when required to interpret a statute which is ambiguous"). And in considering extrinsic evidence in such context, it is appropriate to "look to the history of the times, and examine the state of things existing when it was framed and adopted, to ascertain the old law, the mischief and the remedy." *Rhode Island v. Massachusetts*, 37 U.S. at 723 (internal citation omitted). *Cf. New Jersey v. New York*, 523 U.S. at 813 (Breyer, J., concurring) (noting that, although silence does not create ambiguity, "silence means that ordinary background law applies"). Thus, the context in which the States drafted the Compact is relevant.

It is also necessary to analyze Article VII in the context of the rest of the Compact. *See Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 125 S. Ct. 2611, 2620 (2005) ("we must examine the statute's text in light of context, structure, and related statutory provisions"); *see also United States Nat. Bank v. Ind. Ins. Agents of Am.*, 508 U.S. 439, 454 (1993). It is "a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (internal quotation marks omitted).

There is no indication in the Compact, in existing caselaw or elsewhere as to what the term "riparian jurisdiction" might mean. But certainly the concept of "riparian rights" was, as discussed above, well known by the States at the time of the Compact. The grant of "riparian jurisdiction" must be construed against that backdrop of riparian rights understood by the parties to the Compact in 1905. As then understood, riparian rights related primarily to the right of access to navigable waters and the right to use waters appurtenant to riparian property. But that right of

access did not automatically permit a riparian landowner to use that access to engage in any activity whatsoever, free from regulation or oversight by the State. Instead, riparian rights, including the right to build a wharf, remained subject to regulation under a State's police powers regarding the types of activities for which the wharf could be used. Thus, historically, the authority to exercise riparian rights has been viewed as separate from – and subservient to – a State's general regulatory law. In light of Article VII's preservation of only "riparian" jurisdiction to each State, the parties must have intended that the jurisdiction preserved to each State relate only to oversight of riparian rights and the exercise of such rights, and not a grant of general police powers to be exercised by one State within the territory of the other.

Because the drafters placed the reservation of "riparian jurisdiction" in the same Article – indeed in the same sentence – that reserved to the States the power to grant "riparian rights," it is reasonable to assume that the parties intended the recognition of continuing "riparian jurisdiction" to relate in some way to the similar power to grant "riparian rights." The language of Article VII thus suggests that each State retained the ability to grant riparian rights and exercise jurisdiction over riparian rights on its own shores, regardless of where the boundary might later be located. That is consistent with the language in Article VII that allowed each State to "continue" exercising "riparian jurisdiction."[103] The parties thus must have intended that New Jersey law continue to govern the scope of riparian rights along New Jersey's shore, as it had in practice done for decades, and that Delaware law

[103] Compact Art. VII, App. B-5.

continue to govern the scope of riparian rights along Delaware's shore.

The drafters might have included that language out of a concern on the part of New Jersey that, if the boundary eventually were found to rest at the low water mark, the exercise of riparian rights, such as the right to wharf out, could become subject to Delaware's law, rather than New Jersey's. *See, e.g., Weems Steamboat Co. v. People's Steamboat Co.*, 214 U.S. 345, 355 (1909) (stating that ordinarily the "rights of a riparian owner upon a navigable stream in this country are governed by the law of the state in which the stream is situated"). As discussed above, at the time of the Compact, the two States treated riparian rights and ownership of riparian lands differently. By including the authority to exercise "riparian jurisdiction" as well as to make grants of riparian rights, the States ensured that each State would be able to apply its own laws, *i.e.*, to exercise its own jurisdiction, in determining the standards to be met in making riparian grants and otherwise regulating riparian rights, such as the right to wharf out.

In any event, "riparian" is a limiting modifier. The phrase "riparian jurisdiction" fairly can be read only to mean the authority of each State, on its own side of the River, to establish and oversee the riparian rights associated with land appurtenant to the River, under its own laws. It cannot be construed as confirmation of broader police powers to regulate all activities that might be conducted on riparian improvements even to the extent those improvements cross the boundary line. The preservation of riparian jurisdiction logically should be confined to the power of each State on its own side of the River to determine the extent of riparian rights, as, for example, by

defining how far a riparian owner can wharf out, the quantities of water that a riparian owner can draw from the River, and the like. While an exercise of riparian jurisdiction under those parameters necessarily would include a limited exercise of police powers, it is not a general authorization for the exercise of full police powers to regulate matters beyond each State's law of riparian rights.

That understanding is consistent with the language used by New Jersey in its various grants of riparian lands. It, in the exercise of its riparian jurisdiction to define the outer limits of a riparian owner's riparian rights, typically set boundaries for wharfing out and other riparian construction. It has not purported to define what the riparian owner could or could not do with the wharf. Of course, above the low water mark, New Jersey, as sovereign, retains its full police powers. Presumably for any riparian improvement, such as a wharf, that begins on the New Jersey shore and extends outshore of the low water mark, New Jersey, under its police powers, may continue to exercise full regulatory authority down to the boundary line at low water. As a practical matter, New Jersey effectively could limit what takes place outshore of the low water mark by exercising regulatory control over wharves above the low water mark. It could, for example, exercise that control by regulating access to and from the wharf above the low water mark. Nevertheless, outshore of the low water mark, Article VII entitles New Jersey to exercise only "riparian" jurisdiction, which is a subset of the total bundle of police powers.

Historical evidence also supports Delaware's position that the parties used the phrase "riparian jurisdiction of every kind and nature" as a reflection of each State's

interest in assuring that it would be able to continue regulating riparian rights according to its own laws in all respects.

In 1867 New Jersey's then Attorney General, George M. Robeson, issued a detailed opinion on the scope of riparian rights and the State's regulation of those rights.[104] He chronicled the common law origins of New Jersey's law of riparian rights. As he explained it, riparian rights under New Jersey law focus on the riparian owner's access to navigable waters. They are "confined to uses naturally incidental to the right to occupy the shore, such as the right of passage and landing, of egress and ingress to and from, and the general use of the docks and wharves which the 'riparian owner' may have constructed."[105] Robeson also recognized that in New Jersey riparian rights were not absolute, but rather were subject to varying degrees of regulation by the State. The State retained the power to regulate – or even eliminate – riparian rights for "public uses."[106] According to Robeson, New Jersey law recognized "two great classes" of "public uses" for which the State could restrict riparian rights:

> the one comprising the essential interests of governmental strength and public safety, upon which the government itself acts directly; and the other, those objects, which more remotely affecting the public welfare, are usually committed

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[104] Opinion Concerning Riparian Rights by Hon. George M. Robeson, Attorney General of New Jersey, to the New Jersey Senate, dated Mar. 15, 1867 (DA 905-11).

[105] *Id.* at 9 (DA 909).

[106] *Id.* at 10 (DA 910).

> to the conduct of private enterprise, under the regulating supervision of the government.[107]

Riparian rights in New Jersey are "in their very nature themselves subject to that class of 'public uses' which have been spoken of as the peculiar objects of direct governmental action," including "navigation and the great public uses for defence and public safety, (fortifications, arsenals, break-water and light-houses, are examples of this class of 'public uses')."[108] Thus, New Jersey landowners' riparian rights to access navigable waters over the foreshore owned by the State "are held, subject, as a condition of their existence, to the use of the public domain for the governmental purposes of defence and public safety; and the use of this domain for such purposes would be in no sense a 'taking' of them" requiring compensation.[109]

In contrast to those "great public uses," under New Jersey law the State also retained the authority to regulate or take riparian rights "for other 'public purposes,' upon compensation rendered, (turnpikes, railroads, canals, ferries, public basins, docks and wharves, are examples of these other 'public uses')."[110] In those contexts, where the State desires to eliminate a landowner's riparian rights, "the 'riparian rights' may be taken and extinguished by the exercise of the right of eminent domain, upon compensation rendered."[111]

Thus, in New Jersey, the State exercised jurisdiction over riparian rights in a variety of ways, depending on the particular uses involved and an assessment of whether

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[107] *Id.*

[108] *Id.* at 11-12 (DA 910-11).

[109] *Id.*

[110] *Id.* at 12 (DA 911).

[111] *Id.* at 12-13 (DA 911).

they constituted mere "public uses" or "great public uses." By preserving to each State the authority to continue exercising "riparian" jurisdiction of every kind and nature, the drafters of the Compact intended to ensure that each State would be free to continue exercising jurisdiction over riparian rights according to its own laws. That language preserved New Jersey's ability to regulate, or even eliminate, riparian rights according to its own laws. But that authority nevertheless was limited to jurisdiction over riparian rights, and not a broad exercise of police powers.

New Jersey's commissioners involved in drafting the Compact included two lawyers who served as New Jersey's Attorneys General in the period during which the Compact was negotiated. They would have been familiar with their predecessor's specifically detailed opinion on riparian rights and jurisdiction. That understanding of New Jersey's various ways of regulating riparian rights likely influenced the drafters' use of the phrase "riparian jurisdiction of every kind and nature" in Article VII. The parties intended that Article VII preserve for New Jersey the right to regulate riparian improvements appurtenant to its shore, *i.e.*, to exercise "riparian jurisdiction" over such improvements, to the same extent that its authority to make grants of riparian rights was preserved.

2. New Jersey's Claim of Exclusive Riparian Jursidiction.

a. The 1905 Compact

New Jersey also contends that the preservation of its ability to exercise riparian jurisdiction "of every kind and nature" gives it the *exclusive* right to exercise such

jurisdiction.[112] That contention is contrary to the plain language of the Compact. It would require the Court to read "riparian jurisdiction of every kind and nature" to mean "exclusive jurisdiction of every kind and nature" – a far broader concept than the language agreed upon by the drafters. Whatever the scope of "riparian jurisdiction" reserved to each State in Article VII, there is nothing in the language of the Compact suggesting that such jurisdiction would be exclusive for improvements straddling the boundary line. On the contrary, when viewed through the lens of the remainder of the Compact, it appears that the States consciously chose not to make the jurisdictional reservation in Article VII exclusive.

In other provisions of the Compact, the States expressly agreed to make jurisdiction exclusive in one State or the other. In Article IV, the parties provided, "Each State shall have and exercise *exclusive jurisdiction within said river* to arrest, try, and punish its own inhabitants for violation of the concurrent legislation relating to fishery herein provided for."[113] The parties also mentioned "exclusive jurisdiction" in Articles I and II, discussing the right to serve criminal process related to offenses committed "on board of any vessel being under the exclusive jurisdiction of that State."[114] Thus, the drafters were aware of the concept of "exclusive jurisdiction" and included it in other portions of the Compact when defining the States' respective rights.

Yet in Article VII, the States agreed only that each State could "exercise riparian jurisdiction of every kind and nature," without specifying that such jurisdiction

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[112] *See* Transcript of Oral Argument held on Feb. 22, 2007, at 15-17.

[113] Compact Art. IV (emphasis added), App. B-5.

[114] Compact Arts. I and II, App. B-2, B-3.

could be exercised only by that State.[115] The parties' decision to omit the word "exclusive" in Article VII while including it elsewhere in the Compact had to be intended to have significance and could not have been an inadvertent omission. New Jersey argues that, by comprehensively preserving to New Jersey riparian jurisdiction of "every kind and nature," the drafters intended that that reservation be exclusive – without actually saying so. According to New Jersey, if it retains "every" kind of jurisdiction, "no jurisdiction is left for the other" State.[116] That is not what Article VII says. First, Article VII preserves only the right to exercise *riparian* jurisdiction of every kind. That reference to riparian jurisdiction must be read to mean something more limited than every kind of jurisdiction. Second, the fact that Article VII allows New Jersey to continue exercising every kind of riparian jurisdiction does not mean that Delaware is not also entitled to exercise jurisdiction to the extent projects straddle the common border. Article VII cannot be read to mean that New Jersey's right to continue exercising riparian jurisdiction of every kind equates with *exclusive* jurisdiction where the drafters plainly did not say so.

New Jersey's position that Delaware essentially agreed to cede all jurisdiction over lands adjacent to New Jersey's shore, while Delaware still adamantly asserted title to those lands even after adoption of the 1905 Compact, is implausible. As New Jersey itself points out, the "Commissioners who negotiated the Compact of 1905 did not know where the boundary between the states would

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[115] Compact Art. VII, App. B-5.

[116] New Jersey's Opposition to Delaware's Motion for Summary Judgment at 37.

ultimately be set."[117] Delaware would not have willingly ceded all jurisdiction over matters taking place on land that it still contended it owned exclusively and outright. *Cf. Virginia v. Maryland*, 540 U.S. 56, 69 (2003) ("we read the 1785 Compact in light of the ongoing dispute over sovereignty").[118]

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[117] New Jersey's Opposition to Delaware's Motion for Summary Judgment at 32.

[118] Both parties point to *Virginia v. Maryland* as support for their arguments. In *Virginia v. Maryland*, the Court held that, under the terms of a 1785 compact and an 1877 arbitration award, Virginia was authorized to construct a water intake structure extending into the Potomac River, even though Virginia's boundary ended at the low water mark on its own side of that river. Superficially, that holding would appear to support New Jersey's argument here, *i.e.*, that construction of wharves off New Jersey's shore should not be subject to regulation by Delaware. But the Court's decision in *Virginia v. Maryland* followed from the unique language of the compact and arbitration award involved in that case. In that case, the 1785 compact specifically provided that the "citizens of each state respectively shall have full property in the shores of Potowmack river adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharves and other improvements, so as not to obstruct or injure the navigation of the river." 540 U.S. at 62. The subsequent arbitration award likewise provided that

> Virginia is entitled not only to full dominion over the soil to low-water mark on the south shore of the Potomac, but has a right to such use of the river beyond the line of low-water mark as may be necessary to the full enjoyment of her riparian ownership, without impeding the navigation or otherwise interfering with the proper use of it by Maryland, agreeably to the compact of seventeen hundred and eighty-five.

Id. at 62-63.

Maryland previously had agreed that the effect of those provisions essentially was to incorporate any riparian improvements on the Virginia shore into Virginia's sovereign territory. For instance, in proceedings before the arbitrator, Maryland suggested *not* drawing the boundary at the low water mark on Virginia's shore, but rather "contended that the 'true' boundary line should be drawn around 'all

(Continued on following page)

b. The New Jersey-New York Compact of 1834.

The conclusion that the parties did not intend the reservation of "riparian" jurisdiction to equate to "exclusive" jurisdiction is further supported by a comparison of the language in the Compact to the language used in comparable provisions in the interstate compact entered into in 1834 between New Jersey and New York. That compact, among other things, established those States' rights and jurisdiction over common riparian boundaries. In the 1834 compact, the two States established their common boundary along the Hudson River. In one area it was set at "the low water-mark on the westerly or New Jersey side thereof," similar to the boundary between New Jersey and Delaware.[119] But in discussing New Jersey's retained jurisdiction over riparian improvements along its entire shore, including the portion which the States agreed New York owned up to the low water mark, the States provided:

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wharves and other improvements now extending or which may hereafter be extended, by authority of Virginia from the Virginia shore into the [Potomac] beyond low water mark.'" *Id.* at 72 n.7. The Court concluded that, although that express language was not used, the intention of the arbitrators in issuing their award was to achieve the same end – Virginia's authority to construct riparian improvements outshore of the low water mark without regulation by Maryland. The language of Article VII in the Compact of 1905 between New Jersey and Delaware contains no comparably clear language providing that the preservation of riparian jurisdiction for New Jersey was intended either to encompass all regulatory oversight (as opposed to merely riparian oversight) or to be exclusive of jurisdiction by Delaware.

[119] Compact between the State of New Jersey and the State of New York, Art. Third, 4 Stat. 708 (1834) (DA 887).

> 1. The state of New Jersey shall have *the exclusive right of property* in and to the land under water lying west of the middle of the bay of New York, and west of the middle of that part of the Hudson river which lies between Manhattan island and New Jersey.
>
> 2. The state of New Jersey shall have *the exclusive jurisdiction of and over the wharves, docks, and improvements, made and to be made on the shore of the said state*: and of and over all vessels aground on said shore, or fastened to any such wharf or dock; except that the said vessels shall be subject to the quarantine or health laws, and laws in relation to passengers, of the state of New York, which now exist or which may hereafter be passed.[120]

Separate provisions granted New York comparable exclusive jurisdiction and rights over the area adjacent to Staten Island.[121] In other words, despite the fact that the boundary between New York and New Jersey was partially set at the western low water mark on New Jersey's shore, those two States expressly provided that New Jersey would retain exclusive jurisdiction over riparian improvements and vessels along the New Jersey shore. Comparable language is noticeably absent in the Compact.

There is some indication that the drafters of the Compact of 1905 were aware of the New Jersey-New York compact. Several provisions in the two interstate compacts bear strikingly similar language, suggesting at the very least that the drafters of the 1905 Compact might have

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[120] *Id.* (emphasis added)

[121] *Id.* Art. Fifth (DA 887).

drawn from the earlier compact between New Jersey and New York.[122] And, in any event, New Jersey, as a party to the prior compact with New York, cannot disclaim awareness of its own earlier interstate agreement. Nor can New Jersey credibly argue that it was unaware that Article VII could have been drafted in a manner that clearly granted it exclusive jurisdiction over its wharves and other improvements and vessels attached thereto, if that were what the parties contemplated in 1905. Moreover, the New Jersey-New York compact was the focus of notable litigation in both New York and New Jersey – and in this Court – in the years leading up to and surrounding the adoption of the Compact involved in the present action. *See Central R.R. of New Jersey v. Mayor of Jersey City*, 56 A. 239 (N.J. Sup. Ct. 1903) (holding that New Jersey as sovereign retained the right to tax lands under the western half of the river, despite the fact that the compact gave New York exclusive jurisdiction over that territory), *aff'd mem.*, 61 A. 1118 (N.J. 1905), *aff'd*, 209 U.S. 473 (1908); *New York v. Central R.R. Co. of New Jersey*, 42 N.Y. 283 (1870) (holding that New Jersey's "exclusive jurisdiction" over wharves barred New York from declaring them nuisances).

In light of New Jersey's involvement as a party to the 1834 compact with New York and the likely awareness by the drafters of the 1905 Compact of the earlier compact, significance can be drawn from the notable distinctions between the two documents. In construing ambiguous language in an interstate compact, it is appropriate to seek guidance from comparable language in other compacts. *See Oklahoma v. New Mexico*, 501 U.S. at 235 n.5

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[122] A table comparing several provisions of both interstate compacts that contain virtually identical language is included at Appendix J.

("we have on occasion looked to evidence regarding the negotiating history of other interstate compacts"); *Arizona v. California*, 292 U.S. 341, 359-360 (1934)). Here, that comparison reveals that, in the 1834 compact with New York, New Jersey explicitly retained exclusive jurisdiction over its wharves and other improvements along its shore; in the 1905 Compact with Delaware, New Jersey did not. This conspicuous disparity further supports the conclusion that the reservation of "riparian jurisdiction" in Article VII does not bestow upon New Jersey exclusive jurisdiction over all riparian improvements that extend onto Delaware's land.[123]

B. Construing "Riparian Jurisdiction" in Light of the States' Course of Conduct Since Ratification of the Compact.

The States' course of conduct since ratification of the Compact in 1905 also supports the conclusion that the States essentially have interpreted and applied the Compact to provide overlapping jurisdiction over projects extending beyond the low water mark. In interpreting the meaning of Article VII of the Compact, it is appropriate to consider the parties' course of dealings in the years since its ratification. *See United States v. Stuart*, 489 U.S. 353, 369 (1989) ("The practice of treaty signatories counts as evidence of the treaty's proper interpretation, since their conduct generally evinces their understanding of the

[123] Delaware also points to an interstate compact between New Jersey and Pennsylvania entered into in 1783 that concerned rights along another portion of the River. (DA 4403). The language of that compact is sufficiently different from that contained in the Compact that it is not useful in attempting to glean the meaning of Article VII.

agreement they signed."); *see also O'Connor v. United States*, 479 U.S. 27, 33 (1986); *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 259-60 (1984).[124]

1. Delaware's Common Law Riparian Oversight.

At the time the States entered into the Compact in 1905, and continuing beyond the middle of the twentieth century, Delaware had no formal regulatory system in place governing riparian or coastal development. Rather, riparian improvements were governed under its common law and generally were limited only to the extent they constituted a public nuisance. Moreover, unlike New Jersey, Delaware did not issue grants or leases for subaqueous lands under its common law. *See, e.g., Harlan & Hollingsworth Co. v. Paschall*, 5 Del. Ch. 435, 1882 WL 2713, at *10 (1882); *State v. Reybold*, 5 Harr. 484, 1854 WL 847 (Del. Ct. Gen. Sess. 1854); *Delaney v. Boston*, 2 Harr. 489, 1839 WL 165 (Del. Super. Ct. 1839). Thus, the fact that there is little evidence of Delaware's active involvement in shoreland development prior to the mid-1900s, on either its own shore or the New Jersey shore, by itself is not evidence of any active decision by Delaware that it

[124] *Cf. Bell v. New Jersey*, 461 U.S. 773, 784 (1983) (involving subsequent legislative enactments to the same statute, and noting that a particular interpretation "enjoys the support of later Congresses," which "does not establish definitively the meaning of an earlier enactment, but it does have persuasive value"); *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980) (involving subsequent amendment of the same statute, and stating that "while the views of subsequent Congresses cannot override the unmistakable intent of the enacting one, such views are entitled to significant weight, and particularly so when the precise intent of the enacting Congress is obscure") (internal citations omitted).

could not or would not regulate riparian improvements on the eastern shore. Similarly, the fact that Delaware has not opted to tax improvements on New Jersey's shore is not indicative of any affirmative recognition by Delaware that it lacked jurisdiction to do so. That is particularly true in light of legislative enactments by Delaware specifically recognizing that its boundary reached to the eastern side of the River.[125]

2. Delaware's Subaqueous Land Statutes.

In 1961 Delaware enacted its first statute regulating subaqueous lands.[126] Five years later, in 1966, Delaware enacted a broader Underwater Lands Act that contained provisions governing the lease of subaqueous lands by the State.[127] Then three years later, in 1969, Delaware adopted regulations implementing the Underwater Lands Act.[128] Delaware thereafter grandfathered improvements such as piers and wharves built before the 1969 regulations took

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[125] *See* 40 Del. Laws ch. 179 (1935) (defining the boundary of the City of Wilmington as the "low water mark upon the easterly shore of the Delaware River," but restricting the City from taxing property on the eastern side of the River "until the final determination of the effect of an agreement or compact entered into in the year 1905 between the States of New Jersey and Delaware, known as the compact of 1905") (NJA 317a).

[126] *See* 53 Del. Laws ch. 34; Del. Code Ann. tit. 7, § 4520 (repealed 1966).

[127] *See* 55 Del. Laws ch. 442, § 1; Del. Code Ann. tit. 7, §§ 6151-6159 (repealed 1986).

[128] *See* Delaware Water and Air Resources Commission, Regulations Governing the Use of Water Resources and Public Subaqueous Lands, Regulation IV (adopted July 14, 1969) (DA 4023).

effect, but required permits before allowing any modifications to those grandfathered structures.[129] In 1986 Delaware adopted its present Subaqueous Lands Act, 65 Del. Laws ch. 508, Del. Code Ann. tit. 7, ch. 72, that authorizes DNREC to regulate any potentially polluting use made of Delaware's subaqueous lands and to grant or lease property interests in those state lands. *See* Del. Code Ann. tit. 7, § 7206(a).

3. Delaware's Coastal Zone Statutes.

As discussed earlier, Delaware also enacted the DCZA in 1971, designed generally to "protect the environment by controlling and abating pollution in the State." *Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 907 (Del. 1994). The DCZA prohibits "[h]eavy industry uses of any kind" and "offshore gas, liquid or solid bulk product transfer facilities" within the coastal zone. Del. Code Ann. tit. 7, § 7003. It was the DCZA that Delaware, through the DNREC, relied upon to deny permits for the construction of the Crown Landing facility in this case.

In the following year, 1972, Congress enacted the federal Coastal Zone Management Act ("CZMA"), 16 U.S.C. §§ 1451 *et seq*. The CZMA provides that coastal States may submit their own coastal management programs to the Secretary of Commerce for review and approval, and in return – upon approval – receive federal funding for their coastal management programs. *See* 16 U.S.C. §§ 1454-1455.

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[129] *See* Affidavit of William Moyer ("Moyer Aff.") ¶¶ 5-7 (DA 4350-51).

Delaware's coastal management plan, approved by the federal government in August 1979, includes a discussion of LNG facilities and concludes "that there is no site in Delaware suitable for the location of any LNG import-export facility."[130] Delaware's coastal management plan also rejected Salem County, New Jersey's criticism that "Delaware law, in particular the [DCZA], unduly restricts development along the Delaware River in New Jersey," responding that "Delaware's jurisdiction extends to the low water mark on the New Jersey shore."[131] Thus, Delaware concluded that "[i]nasmuch as coastal resources of Delaware may be affected by certain uses of such waters, the Delaware CMP has opposed Salem County efforts to waive the [Act's] regulatory provisions which may relate to development in Salem County."[132] Contemporaneously, Delaware's Attorney General issued a formal opinion in 1978 concluding that the DCZA prohibited bulk transfer facilities located on Delaware's soil on a pier originating on the New Jersey shore.[133]

Even more tellingly, New Jersey's own Coastal Zone Management Program and Final Environmental Impact Statement, dated August 1980, states, "The New Jersey and Delaware Coastal Zone Management agencies have discussed this issue and have concluded that any New Jersey project extending beyond mean low water must

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[130] National Oceanic and Atmospheric Administration, U.S. Department of Commerce, Delaware Coastal Management Program and Final Environmental Impact Statement (Mar. 1980) (DA 2591).

[131] *Id.* (DA 2600, 2605).

[132] *Id.* (DA 2605).

[133] Del. Op. Att'y Gen. 78-018 (1978) (DA 3881).

obtain coastal permits from both states."[134] New Jersey thus represented in its own coastal management plan that it agreed with Delaware that the States have overlapping oversight or jurisdiction over riparian improvements extending off New Jersey's shore, at least to the extent they reach beyond the low water mark. It is hard to imagine how New Jersey can maintain today, several decades later, that Delaware has never had any right to exercise regulatory authority over similar riparian structures. New Jersey attempts to downplay its actions by stating that, during the decades between the 1970s and 1990s, it "experimented with efforts to coordinate its exercise of jurisdiction with Delaware."[135] Yet, however characterized, New Jersey's cooperation with Delaware in allowing Delaware to regulate improvements originating on New Jersey's shore is fundamentally inconsistent with the position advanced by New Jersey here, *i.e.*, that only New Jersey has the right to regulate such projects.

Therefore, essentially from the commencement of its adoption of formal regulatory oversight over coastal waters and subaqueous lands, Delaware has maintained – and, to some extent, New Jersey has agreed – that Delaware has regulatory authority over riparian improvements extending outshore from the low water mark on the eastern shore of the River. That history supports the conclusion that Delaware is entitled to exercise regulatory jurisdiction pursuant to its sovereign police powers over riparian improvements extending from the New Jersey

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[134] New Jersey's Response to Requests for Admissions No. 62 (DA 4177).

[135] New Jersey's Brief in Support of Motion for Summary Judgment at 21.

shore onto Delaware's territory, and that the Compact was not intended to eliminate those powers.

4. Delaware's Regulation of Projects On and Outward from the New Jersey Shore Within the Twelve-Mile Circle.

The record contains evidence that fourteen wharves or structures were built off the New Jersey shore between 1851, when New Jersey began issuing riparian grants, and 2006 that extend outshore of the low water mark and have been able to accept docking vessels.[136] Eleven of those improvements were constructed before 1969, prior to Delaware's adoption of any formal regulations for approving construction of such improvements. Hence all were subject only to Delaware's prior common law of nuisance at the time they were built. Moreover, they were grandfathered under Delaware's first set of administrative regulations governing subaqueous lands enacted in 1969 implementing the Underwater Lands Act.[137] Since 1969, only three additional riparian structures have been built within the disputed territory.[138] And Delaware has regulated all three of those projects.

In 1971, Delaware granted a subaqueous lands lease to E.I. du Pont de Nemours & Co. ("DuPont") to dredge Delaware subaqueous soil, build a dock, and construct a fuel oil storage tank at a facility extending past the

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[136] Affidavit of Laura M. Herr ("Herr Aff.") ¶¶ 18-31 (DA 4328-37).

[137] *See id.* ¶¶ 27-31 (DA 4332-37).

[138] Affidavit of William S. Schenck ("Schenck Aff.") ¶ 12 (DA 4373).

boundary from the New Jersey shore.[139] Since then, Delaware has issued numerous permits for activities at DuPont's facility that extend past the boundary and into Delaware territory.[140]

In 1990 and 1991, Delaware issued a status determination ruling that a coal unloading pier extending outshore of the New Jersey shore proposed by Keystone Cogeneration Systems was a permissible use under the DCZA, and issued a DCZA permit for that project.[141] Delaware also issued a subaqueous lands lease for that project, along with subsequent renewals.[142] New Jersey acknowledges in its summary judgment brief that "Delaware also approved the Keystone pier," without offering any explanation as to why Delaware's actions in asserting jurisdiction – apparently with New Jersey's awareness – should be disregarded.[143]

Most compellingly, Delaware issued a permit in 1996 to New Jersey's Parks and Forestry Division (located

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[139] *See* Delaware Subaqueous Lands Lease (SL-558/1971) issued to DuPont (Sept. 29, 1971) (DA 3403). Because DuPont disputed Delaware's authority to require a lease for that land, Delaware agreed to forego collecting lease payments until the dispute over the outshore lands was resolved, and according to New Jersey, there is no evidence that DuPont has ever made any lease payments to Delaware. *See* Letter from Mr. Fogg to Mr. Lane, dated June 7, 1971 (NJA 648a); New Jersey's Brief in Support of Motion for Summary Judgment at 19.

[140] Moyer Aff. ¶¶ 13-18 (DA 4349).

[141] Affidavit of Philip Cherry ("Cherry Aff.") ¶ 8 (DA 4303); *see* DNREC Coastal Zone Permit issued to Keystone Cogeneration Systems, Inc. (Dec. 13, 1991) (DA 3607).

[142] Moyer Aff. ¶¶ 23-27 (DA 4355); Herr Aff. ¶¶ 10-12 (DA 4326).

[143] New Jersey's Brief in Support of Motion for Summary Judgment at 15 n.11.

within the New Jersey Department of Environmental Protection) to refurbish a stone pier at New Jersey's Fort Mott State Park.[144] Under the arrangement between New Jersey and Delaware, New Jersey issued a waterfront development permit of its own for the project, but New Jersey's permit approved structures *only* to the low water mark. As a result, the project required Delaware's approval for structures outshore of that point.[145] And as recently as August 2006, while this action was pending, New Jersey again applied to Delaware for a renewal of that permit.[146] Once more, New Jersey acknowledges in its summary judgment brief that the permit that New Jersey issued to itself for rehabilitation of the pier also "required approval by Delaware of certain activities outshore of low water."[147] However, New Jersey provides no plausible explanation as to why it would have done so if it did not agree that Delaware had regulatory authority over outshore lands. Thus, New Jersey itself – for its own State-run projects – has sought permits from Delaware for improvements built on New Jersey's shore extending beyond the low water mark.

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[144] *See* DNREC Subaqueous Lands Lease (SL-1110/95) issued to the State of New Jersey Department of Environmental Protection Division of Parks and Forestry (Feb. 7, 1996) (DA 3715); Moyer Aff. ¶ 30 (DA 4356); Herr Aff. ¶ 13 (DA 4326).

[145] *See* New Jersey Fort Mott State Park Permit, January 24, 1996 (NJA 882a).

[146] *See* New Jersey State Park Service Subaqueous Lands Lease Renewal Application (Aug. 16, 2006) (DA 3731); Herr Aff. ¶ 14 (DA 4327).

[147] New Jersey's Brief in Support of Motion for Summary Judgment at 15 n.13.

New Jersey's only asserted distinction, raised at oral argument, was that the Fort Mott project involved not only construction of a pier, but also ferry service that New Jersey's counsel thought might connect to Delaware parks on the opposite side of the River. According to New Jersey, the ferry service connecting New Jersey to Delaware necessarily required a cooperative approach between the two States, and should not be read as acquiescence by New Jersey in Delaware's regulation of the riparian improvements. But New Jersey's distinction is belied by the permits issued for the Fort Mott project. It is clear from the permits – including those issued by New Jersey – that Delaware regulated the construction of the pier itself outshore of the low water mark, and New Jersey not only agreed to that regulation but sought it. Thus, Delaware's involvement was not confined to coordinating ferry schedules or routes or other matters tangential to the approval of the construction of the riparian improvements themselves. By agreeing to such regulation, New Jersey has directly acknowledged the conclusion reached here, namely, that Delaware does have jurisdiction under its police powers to regulate matters occurring in its own waters and on its own soil.

5. New Jersey's Consent to Delaware's Involvement in Regulating Projects On and Outward from the New Jersey Shore Within the Twelve-Mile Circle.

In addition to acknowledging that Delaware has a role in issuing permits for the riparian improvements at New Jersey's own Fort Mott state park, New Jersey has engaged in an extensive pattern of dialogue and cooperation with Delaware over the past several decades that

demonstrates, in some cases explicitly and in others implicitly, a recognition of Delaware's right to regulate projects on and outward from New Jersey's shore.

Like Delaware, New Jersey engaged in a comprehensive process for developing a coastal management plan pursuant to the federal CZMA, adopted in order to obtain federal funding for coastal management. New Jersey began its coastal management plan development in 1973, and received federal approval of its plan in 1978 and 1980. In its 1978 coastal management plan that addressed the boundary, New Jersey observed that "[r]esolution of potential conflicts between the coastal policies of Delaware and New Jersey will require continued coordination and work in the first year of Program approval, toward appropriate agreements between [sic] the coastal management programs of both states, Salem County and the affected municipalities."[148] New Jersey recognized the lingering jurisdictional issues, and stated that "[NJDEP] will also work with the NJDOE, the Attorney General of New Jersey" and other entities "in the next year to resolve boundary issues between [sic] New Jersey, Delaware and New York."[149]

The following year, New Jersey issued a March 1979 report entitled "Options for New Jersey's Developed Coast." There, New Jersey reviewed Delaware's various coastal zone laws and their applicability to the New Jersey

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[148] NJDEP, New Jersey Coastal Management Program – Bay and Ocean Shores Segment and Final Environmental Impact Statement (Aug. 1978) (DA 2327).

[149] *Id.* (DA 4630).

shore.[150] In an appendix to that report, New Jersey observed that "major development extending into the Delaware River could require approval from the State of Delaware, in addition to approvals from the State of New Jersey."[151] New Jersey specifically found that the DCZA does apply to projects that straddle the low water mark boundary. As the report states:

> In 1971, the State of Delaware enacted a stringent Coastal Zone Act, which prohibited heavy industrial development in a defined coastal zone. Since the boundary between New Jersey and Delaware extends to the New Jersey shoreline, the restrictive provisions of this coastal management law applied to development that would be proposed for sites involving land and water along the Salem County Waterfront. . . . The law also prohibits offshore "bulk product transfer facilities" which include port or dock facilities for the transfer of bulk quantities of any substance, such as oil. . . . Consequently, under Delaware law, some types of activities would be prohibited from locating along the Delaware River in Salem County, while other facilities desiring to locate along the river would need to obtain permit approval from the State of Delaware.[152]

The report went on to recognize the applicability of Delaware's submerged lands laws, stating:

> Because the State of Delaware exercises jurisdiction along the Salem County shoreline from the

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[150] *See* NJDEP, Options for New Jersey's Developed Coast (Mar. 1979) (DA 2383).

[151] *Id.* (DA 2509).

[152] *Id.*

> mean low water line waterward, projects involving the use of public submerged lands would require approval under Delaware's Underwater Lands Act. This Act authorizes Delaware to exercise authority over state lands lying below Delaware's mean high waterline [sic]. Projects requiring approval include: (1) erection of any structure on such lands, (2) dredging or filling of such land, (3) the excavation of any channel, lagoon, turning basin, or ditch on public or private lands which will make connection with public submerged lands, (4) the filling of lands adjacent to public submerged lands and (5) laying of any pipeline, transmission line or telephone line in, on, over or under the beds of public submerged lands.[153]

New Jersey concluded its report by acknowledging that its jurisdiction is limited to "a narrow strip of tidelands between the mean high water line and the mean low water line in Salem County."[154] Highlighting the cooperative relationship necessary for any improvements on New Jersey's shore, the report further stressed that "Delaware has agreed to notify Salem County of any proposed activity along the Delaware or Salem County shoreline which is subject to [the DCZA]," and in turn "Delaware has asked Salem County to notify Delaware of any proposed development in Salem County which would fall under [DCZA] jurisdiction."[155]

New Jersey thereafter obtained federal approval of a 1980 coastal management plan that covered the twelve-mile

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[153] *Id.* (DA 2510).

[154] *Id.* (DA 2511).

[155] *Id.*

circle as well as additional coastal lands.[156] Regarding the question of jurisdiction over development, New Jersey's 1980 plan even more clearly recognized that Delaware has the right to exercise regulatory jurisdiction within the twelve-mile circle.

> In most of Salem County, the Delaware-New Jersey State boundary is the mean low water line on the eastern (New Jersey) shore of the Delaware River. The New Jersey and Delaware Coastal Management agencies have discussed this issue and have concluded that any New Jersey project extending beyond mean low water *must obtain coastal permits from both states*. New Jersey and Delaware, therefore, will coordinate reviews of any proposed development that would span the interstate boundary to ensure that no development is constructed unless it would be consistent with both state coastal management programs.[157]

Evidently neither the New Jersey Attorney General nor any of the state agencies that reviewed the 1980 plan disputed that conclusion. Salem County, New Jersey, on the other hand, *did* dispute that conclusion, noting that it was "strongly opposed to the statement in this revision that any project in the area must be consistent with both Delaware's and New Jersey's coastal programs and obtain permits from two states."[158] However, New Jersey's final plan in 1980 specifically rejected Salem County's resistance to the State's acknowledgment of Delaware's regulatory jurisdiction, reporting that the "disagreement is

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[156] *See* NOAA, New Jersey Coastal Management Program and Final Impact Statement (Aug. 1980) (DA 2627).

[157] *Id.* (emphasis added) (DA 2657).

[158] *Id.* (DA 3135).

noted, but [NJDEP] has found no other solution available by administrative action to address the peculiar N.J.-Delaware boundary in Salem County, where the Delaware State line reaches to low tide on the New Jersey shore."[159] Perhaps most presciently, New Jersey's 1980 plan actually addressed LNG facilities, and stated that New Jersey "considers decisions concerning the siting of LNG terminals to be an *interstate* matter."[160]

In the next decade, New Jersey's recognition of Delaware's jurisdiction over projects on the eastern shore of the River continued. In 1991, New Jersey officials began to draft a memorandum of agreement with Delaware officials setting forth parameters for cooperation between the States in overseeing development along the River. Steven Whitney, NJDEP's Assistant Director of the Coastal Resources Division, and other NJDEP staff prepared a detailed summary of New Jersey's and Delaware's coastal regulations that they shared with their counterparts in Delaware.[161] A related memorandum prepared in connection with discussions with Delaware by Rick Sinding, an Assistant Commissioner at NJDEP, also noted that "the State of Delaware's [CMP] may directly and significantly affect activities within New Jersey that are inconsistent with New Jersey's [CMP]."[162] New Jersey then prepared multiple drafts of a proposed memorandum of agreement with Delaware, acknowledging that "[b]oth [State] agencies

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[159] *Id.*

[160] *Id.* (emphasis added) (DA 2891).

[161] Letter from Steven C. Whitney, NJDEP, to Anthony T. Manus, Delaware Department of Natural Resources and Environmental Control, dated Nov. 8, 1991, with attachments (DA 3209).

[162] Memorandum from Rick Sinding to Management Team, dated Nov. 1, 1991 (DA 3234).

recognize that each agency has the independent authority to approve or deny applications pursuant to its own regulations."[163] Ultimately, the States never executed the draft memorandum of agreement. Nevertheless, the multiple iterations of the draft – prepared by New Jersey – all recognized Delaware's right to regulate under Delaware law projects extending outshore of the boundary.

Finally, in connection with BP's proposal to construct an LNG facility on New Jersey's shore that precipitated New Jersey's filing of this original action, New Jersey previously took a position – before deciding to commence these proceedings before this Court – that accepted Delaware's authority to regulate the environmental impact of at least the portion of the proposed project to be located in Delaware. In comments filed with the Federal Energy Regulatory Commission on April 25, 2005 (but dated February 4, 2005), only a few months before seeking leave to reopen *New Jersey v. Delaware II*, New Jersey stated:

> The project site is located in the States of Delaware and New Jersey. Accordingly, activities taking place from the mean low water line (MLWL) outshore are located in the State of Delaware and therefore *are subject to Delaware Coastal Zone Management Regulations*. Activities or associated impacts to New Jersey's coastal resources occurring from the MLWL landward are the subject of this application [to NJDEP].[164]

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[163] (DA 3267-68, 3273-74) (8/3/93 draft); (DA 3175) (10/18/93 draft); (DA 3182, 3253, 3261) (10/28/93 draft); (DA 3192, 3198) (11/5/93 draft); (DA 3203, 3239, 3245) (6/16/94 draft).

[164] Letter from David Q. Risilia, Project Manager, New Jersey's Office of Dredging and Sediment Technology, to David Blaha, at Environmental Resources Management, dated Feb. 4, 2005 (emphasis

(Continued on following page)

In other words, even in connection with the project that spawned the present action, New Jersey originally represented to the federal government that Delaware *does* have regulatory jurisdiction over the project to the extent it spans the boundary at the low water mark.

Thus, for a period of several decades since Delaware first adopted a system of shore land statutes and regulations, the parties have followed a consistent pattern of understanding that Delaware had overlapping jurisdiction to regulate developments on the New Jersey shore extending beyond the low water mark. Such overlapping jurisdiction is consistent with the preservation of "riparian jurisdiction" to New Jersey provided in Article VII of the Compact.

Conclusion: The Riparian Jurisdiction Issue

Overlapping jurisdiction by two sovereigns may pose practical difficulties. But that result is compelled by the language of the Compact and has been followed by the States since they began actively regulating riparian developments several decades ago. Practical difficulties alone do not permit the Court to rule in favor of New Jersey in the face of language and practice to the contrary. *Cf. New Jersey v. New York*, 523 U.S. at 810 (rejecting

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added) (DA 4641). That letter, apparently prepared in response to BP's Crown Landing waterfront development application to New Jersey, contained a finding that BP's application was deficient under New Jersey law. New Jersey later submitted the letter to the Federal Energy Regulatory Commission in connection with New Jersey's comments on the Draft Environmental Impact Statement for the Crown Landing project. (DA 4673). New Jersey later wrote to Mr. Blaha asking him to "disregard" its representations. *See* Letter from Joseph J. Seebode, Assistant Commissioner, NJDEP, to David Blaha, at Environmental Resources Management, dated May 24, 2005. (DA 4683).

Special Master's recommendation that the Court adjust the boundary line on Ellis Island to avoid cutting through existing buildings "for reasons of practicality and convenience," concluding that "these drawbacks are the price of New Jersey's success in litigating under a compact whose fair construction calls for a line so definite"). Nor can the Court rewrite the Compact to achieve a result that in hindsight might be more efficient and workable under present day scenarios. *Cf. Director, Office of Workers' Compensation Programs v. Rasmussen*, 440 U.S. 29, 47 (1979) ("Congress has put down its pen, and we can neither rewrite Congress' words nor call it back 'to cancel half a Line.' ").[165] This case does not require a determination of the precise extent of Delaware's regulatory jurisdiction, but only whether Delaware may exercise any jurisdiction over wharves and other improvements extending outshore of the boundary.

The Compact does not preserve for New Jersey exclusive jurisdiction over riparian improvements extending off New Jersey's shore beyond the low water mark. Rather, while New Jersey may exercise riparian jurisdiction over such projects, Delaware, as the sovereign with title to the water and outshore land, is entitled to exercise jurisdiction pursuant to its police powers over such projects to the extent they encroach onto Delaware's territory. Therefore, I conclude that:

> **The preservation of "riparian jurisdiction" contained in Article VII of the Compact does not bestow upon New Jersey regulatory jurisdiction over all aspects of riparian**

[165] The internal quotation comes from Edward Fitzgerald's translation of quatrain LI of "The Rubaiyat of Omar Khayyam."

improvements appurtenant to the New Jersey shore extending outshore of the eastern low water mark within the twelve-mile circle of the Delaware River; rather, New Jersey's jurisdiction outshore of that low water mark is limited to regulation of riparian rights associated with improvements extending onto Delaware's territory.

Delaware, as the sovereign owner of the land outshore of the low water mark on the eastern shore of the Delaware River within the twelve-mile circle, is entitled to exercise police power jurisdiction over improvements extending onto its territory, and accordingly New Jersey's riparian jurisdiction over such improvements is not exclusive.

III. The Estoppel Issue.

New Jersey argues that, even if Article VII does not expressly reserve to New Jersey the exclusive jurisdiction to exercise regulatory jurisdiction over riparian improvements on the eastern shore of the Delaware River, Delaware should be judicially estopped from disputing New Jersey's position that it does, because of representations made by Delaware during the course of proceedings in *New Jersey v. Delaware II*. Delaware, in that case, did indeed make many representations concerning the scope of New Jersey's authority to make grants, leases and conveyances of riparian *rights* and it is bound by those representations in this action. Now going further, New Jersey asserts that Delaware made representations concerning the scope of New Jersey's preserved riparian *jurisdiction* that also should bind Delaware today. However, close

examination of those representations in the context in which they were made shows them insufficient to estop Delaware from challenging New Jersey's claim to exclusive riparian jurisdiction in this litigation.

The doctrine of judicial estoppel applies in original jurisdiction actions between States. *See New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) ("we conclude that a discrete doctrine, judicial estoppel, best fits the controversy"). Under that doctrine, "where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *Id.*

The factors to be considered in determining whether to estop a party from taking a position contrary to a position taken in a prior litigation are: whether a party's current position is "clearly inconsistent" with its earlier position; whether "the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled"; and whether "the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Id.* at 750-51 (internal quotations omitted).

To support its estoppel claim, New Jersey points to the following statements made by Delaware before the Special Master in *New Jersey v. Delaware II*. First, in one of its

briefs submitted to the Special Master in that case, Delaware stated, "Article VII of the Compact is obviously merely a recognition of the rights of the riparian owners of New Jersey and *a cession to the State of New Jersey by the State of Delaware of jurisdiction to regulate those rights.*"[166] Second, in oral argument before the Special Master in that case, Delaware's counsel asserted that "the Compact of 1905 *ceded to the State of New Jersey all the right to control the erection of those wharves and to say who shall erect them*, and it was a very sensible thing to do."[167]

Taken out of context and in isolation, those comments arguably could be read to support New Jersey's claim to exclusive jurisdiction over riparian projects on the New Jersey shore, and that Delaware agreed that the Compact preserved such jurisdiction for New Jersey regardless of where the boundary might be. However, a closer analysis

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[166] Delaware's Reply Brief to Special Master in *New Jersey v. Delaware II* at 9 (emphasis added) (NJA 123a).

[167] Statement of Clarence Southerland in Transcript of Oral Argument Before Special Master in *New Jersey v. Delaware II* at 91 (emphasis added) (NJA 126a-1). Delaware suggests that, because those representations were made to the Special Master rather than directly to this Court, there is no basis for application of judicial estoppel, because the Special Master was only empowered to issue a recommendation, not a binding decision. Delaware's Brief in Opposition to New Jersey's Motion for Summary Judgment at 50-51. Delaware has not cited any caselaw directly supporting that proposition. Because it is clear for other reasons that Delaware is not judicially estopped from challenging New Jersey's claim to exclusive jurisdiction under the facts of this case, it is unnecessary to determine whether a party's inconsistent representations made to a Special Master in an action under this Court's original jurisdiction can ever form the basis for such an estoppel. *Cf. Anjelino v. New York Times Co.*, 200 F.3d 73, 100 (3d Cir. 1999) (affirming district court's application of judicial estoppel in the context of a party's representation made to a magistrate judge).

in the context of other statements by Delaware in *New Jersey v. Delaware II*, makes it apparent that New Jersey is reading too much into those remarks.

First, Delaware's representation that it had ceded to New Jersey "jurisdiction to regulate" riparian rights, and "all the right to control the erection of those wharves and to say who shall erect them," does not necessarily mean that Delaware was conceding that it had ceded *exclusive* jurisdiction to New Jersey over any and all matters related to riparian improvements on the eastern shore of the River. In fact, Delaware's statements are fully consistent with the interpretation of Article VII reached here, namely, that the States agreed to preserve for New Jersey the right to exercise its own jurisdiction over riparian improvements appurtenant to its shore, and the authority to grant riparian rights. Beyond that, however, New Jersey has not pointed to any statements by Delaware in which it suggested that New Jersey would have the *exclusive* authority to regulate all aspects of riparian improvements, even if on Delaware's land.

Second, Delaware's comments were made in the context of the States' briefing of the boundary issue. The scope of New Jersey's jurisdiction over riparian improvements on its shores, although relevant to that inquiry, was not dispositive. Delaware argued to the Court – and prevailed on – its theory that the States' common boundary should be located at the low water mark. It would be odd indeed if Delaware simultaneously took the position that – even if the boundary were so located – Delaware would have no sovereign jurisdiction over the land that it continuously asserted it owned. If that were the case, Delaware's victory in *New Jersey v. Delaware II* would be a Pyrrhic one. Delaware never would have intended that its

statements about jurisdiction have the broad reach now ascribed to them by New Jersey. Rather, it is clear that Delaware intended only that Article VII reserve a limited amount of jurisdiction for New Jersey on the eastern shore.[168]

Third, Delaware did not repeat the language highlighted by New Jersey in its briefs before this Court on the States' exceptions to the Special Master's recommendations in *New Jersey v. Delaware II*. Rather, in its later briefing Delaware expressed its understanding regarding jurisdiction in a different manner, stating,

> Even if the Compact of 1905 be construed as ceding to the State of New Jersey *the right to determine* to whom riparian rights (i.e., wharf rights appurtenant to riparian lands) shall be granted, it would still not affect the boundary between the States in any conceivable way. The boundary line would continue to be low water mark.[169]

That representation suggests only that Delaware acknowledged that, at most, the Compact had "ceded" to New Jersey the authority to regulate riparian rights off New Jersey's shore directed toward Delaware's waters, regardless of where the boundary eventually was located. It does not suggest that Delaware had given up any claim of jurisdiction also to regulate such improvements to the extent they actually do intrude onto Delaware territory. That narrower reading also is consistent with the course of conduct of both States over the past several decades. Not only has Delaware regulated improvements on New

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[168] *See supra* note 84.

[169] Delaware's Reply Brief to this Court in *New Jersey v. Delaware II* at 29 (NJA 142a).

Jersey's shore, but, in at least some instances, New Jersey has expressly acquiesced in such regulation.

New Jersey has thus taken out of context the isolated remarks by Delaware in *New Jersey v. Delaware II*. Therefore, the position advanced by Delaware in this action is not "clearly inconsistent with its earlier position," and thus there is no basis for judicially estopping Delaware from disputing New Jersey's claim to exclusive regulatory jurisdiction over riparian improvements on the eastern shore. *New Hampshire v. Maine*, 532 U.S. at 750. That contrasts with Delaware's repeated statements in *New Jersey v. Delaware II* concerning Delaware's agreement that New Jersey continued to retain the authority to make grants of riparian rights, including the right to wharf out, that are fundamentally at odds with the position it has taken in this litigation. Delaware's prior statements concerning riparian *jurisdiction* do not justify judicial estoppel.

Conclusion: The Estoppel Issue

Delaware's prior statements in *New Jersey v. Delaware II* concerning New Jersey's jurisdiction under Article VII of the Compact are not clearly inconsistent with the position it has taken in this action, namely, that the riparian jurisdiction preserved for New Jersey in the Compact is non-exclusive. Accordingly, Delaware is not judicially estopped from challenging New Jersey's contention that New Jersey alone has jurisdiction to regulate any riparian improvements occurring on New Jersey's shore. Therefore, I conclude that:

Delaware is not estopped from challenging New Jersey's assertion of exclusive jurisdiction to regulate riparian improvements appurtenant to the New Jersey shore extending outshore of the eastern low water mark of the Delaware River within the twelve-mile circle.

IV. The Prescription Issue.

New Jersey also argues that, even if the Compact does not give it exclusive jurisdiction to regulate riparian improvements emanating from the eastern shore of the Delaware River, Delaware has lost its sovereign right to exercise jurisdiction over its own lands through prescription and acquiescence.[170] Even assuming that the doctrine of prescription and acquiescence applies in the context of an interstate compact approved by Congress,[171] New Jersey, to succeed, must "'show by a preponderance of the evidence . . . a long and continuous . . . assertion of sovereignty over'" Delaware's territory, as well as Delaware's acquiescence in New Jersey's prescriptive acts. *New Jersey v. New York*, 523 U.S. at 787 (quoting *Illinois v. Kentucky*, 500 U.S. 380, 384 (1991)).

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[170] Delaware conceded at oral argument that it is not advancing any argument of prescription and acquiescence against New Jersey in its motion for summary judgment. *See* Transcript of Oral Argument held on Feb. 22, 2007, at 124-25.

[171] New Jersey candidly states that it "is not apparent, however, that one state can lose a federally-approved compact right through prescriptive acts of another state, as this would amount to one state unilaterally altering a federal law. To our knowledge, no case has held that prescription can alter a federally-approved compact." New Jersey's Brief in Support of Motion for Summary Judgment at 40 n.23.

"Although 'we have never established a minimum period of prescription' necessary for one State to prevail over a coequal sovereign on a claim of prescription and acquiescence, we have noted that the period must be 'substantial.'" *Virginia v. Maryland*, 540 U.S. at 76 (quoting *New Jersey v. New York*, 523 U.S. at 786, 789). With few exceptions, the acquiescence cases between sovereign States show that the period for finding acquiescence must be extensive – in many cases approaching or exceeding 100 years.[172] In *Virginia v. Maryland*, the Court noted – although it did not conclusively hold – that a period of 32 to 43 years likely was inadequate for proving prescription in an original jurisdiction case. *See id.* at 77. New Jersey agrees that, to prevail on a claim of prescription, it must prove at a minimum that it exercised exclusive jurisdiction over riparian improvements on Delaware's land for "significantly long[ ] periods."[173] Yet New Jersey has not established any appreciable period of time when it exercised exclusive jurisdiction over riparian improvements on the eastern shore of the River, except prior to the era of any active regulation by Delaware even on Delaware's own shore.

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[172] *See Georgia v. South Carolina*, 497 U.S. 376, 392-93 (1990) (over 130 years); *California v. Nevada*, 447 U.S. 125, 126 (1980) ("the better part of a century"); *Ohio v. Kentucky*, 410 U.S. 641, 650-52 (1973) (150 years); *Arkansas v. Tennessee*, 310 U.S. 563, 567-72 (1940) (over 100 years); *Louisiana v. Mississippi*, 202 U.S. 1, 53-58 (1906) (90 years); *Virginia v. Tennessee*, 148 U.S. 503, 524 (1893) (over 85 years). *But see Nebraska v. Wyoming*, 507 U.S. 584, 594-95 (1993) (stating in dicta that a 41-year period was adequate for prescription).

[173] New Jersey's Brief in Support of Motion for Summary Judgment at 41.

In addition, in order to prove that Delaware has lost any right to assert jurisdiction over its own territory, New Jersey must prove that Delaware "'failed to protest' her assertion of sovereign authority" to exercise exclusive jurisdiction over riparian improvements outshore of the boundary. *Id.* (quoting *New Jersey v. New York*, 523 U.S. at 807). New Jersey has not met its burden of proving acquiescence under the unique circumstances of this case.

New Jersey begins by arguing that between 1854 and 1971, New Jersey, through either its legislature or the Board of Riparian Commissioners, issued numerous grants and leases for tidelands conveyances and development on its shoreline, and authorized the construction of piers and wharves extending outshore of the low water mark.[174] New Jersey also enacted legislation dating to the 1800s that generally regulated wharfing and subaqueous lands along its shores, including – but not specifically directed at – the disputed land.[175]

However, that evidence misses the mark. As in *Virginia v. Maryland*, the boundary between New Jersey and Delaware is not now in dispute, having been conclusively resolved by this Court in *New Jersey v. Delaware II*. Thus, evidence of New Jersey approving the construction of wharves or otherwise exercising riparian rights – even assuming Delaware acquiesced in such conduct – has no bearing on New Jersey's burden to prove specifically that Delaware acquiesced in New Jersey's exercise of *exclusive* jurisdiction over riparian development on the eastern

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[174] *See* Appendix I.

[175] *See, e.g.*, Wharf Act, 1851 N.J. Laws, p. 335 (NJA 206a); 1869 N.J. Law, ch. 383, N.J. Stat. Ann. § 12:3-2 (NJA 232a).

shore. Such evidence arguably could show an understanding by the States that New Jersey is entitled to grant riparian rights and exercise some level of jurisdiction over those improvements, authority that is expressly confirmed by the Compact. However, it would not establish any understanding or agreement by Delaware that New Jersey's right to exercise such jurisdiction is exclusive or that it deprives Delaware of overlapping jurisdiction over improvements extending onto its own lands.

In other words, New Jersey must prove more than that it engaged in riparian activities on its shores, while Delaware historically did not. It must prove that Delaware in some demonstrable way agreed with New Jersey's claim that New Jersey alone was entitled to exercise such powers. *See Virginia v. Maryland*, 540 U.S. at 77 n.10 ("Maryland's evidence that Virginia has never operated a permitting system for water withdrawal or waterway construction is insufficient to satisfy Maryland's burden."); *New Jersey v. New York*, 523 U.S. at 788 n.9 (rejecting prescription claim by New York based on New Jersey's failure to act on territory in dispute, because "New York cannot meet its burden of proving prescription by pointing to New Jersey's failure to present evidence that it exercised dominion over the filled portions of the Island"). Therefore, the fact that Delaware did not adopt a regulatory system for permitting waterfront and subaqueous development until after the middle of the twentieth century – either within the twelve-mile circle or along the remainder of Delaware's shores – does not establish that Delaware thereby acquiesced in any claim by New Jersey to the exclusive right to regulate improvements extending into the River off the eastern shore. *See, e.g., Georgia v. South Carolina*, 497 U.S. at 389 ("Inaction, in and of itself, is

of no great importance; what is legally significant is silence in the face of circumstances that warrant a response.").

New Jersey's claim that Delaware acquiesced since the 1800s in New Jersey's right exclusively to regulate improvements on its shores is belied by the contentious relationship between the two States over the River essentially from the time of American independence. Delaware consistently asserted its claim that it owned up to the low water mark on the New Jersey shore. In *New Jersey v. Delaware II*, New Jersey argued that it had acquired title to the River and subaqueous soil up to the middle of the shipping channel based on Delaware's alleged acquiescence in New Jersey's riparian grants and the construction of wharfs extending into the River. This Court rejected New Jersey's argument, noting that "almost from the beginning of statehood Delaware and New Jersey have been engaged in a dispute as to the boundary between them. There is no room in such circumstances for the application of the principle that long acquiescence may establish a boundary otherwise uncertain." *New Jersey v. Delaware II*, 291 U.S. at 376. In this action, New Jersey essentially points to the same history of riparian development to which it directed the Court's attention in *New Jersey v. Delaware II*. Just as it was insufficient to establish New Jersey's ownership or title outshore of the low water mark, so, too, is it insufficient to support New Jersey's claim that Delaware ceded to New Jersey all jurisdiction over those same waters and lands.

New Jersey argues that in more recent decades it has imposed additional regulatory and permitting requirements on proposed projects on its shore, including the introduction of expanded requirements for dredging, pier construction, discharge pipes and other water diversion

structures. Again, however, the fact that New Jersey has engaged in its own regulation of riparian development taking place on its shores, and the fact that Delaware may have been aware of New Jersey's activities in regulating projects on New Jersey's own shore, say nothing about whether Delaware has acquiesced in allowing New Jersey the exclusive right to exercise such oversight. On the contrary, the undisputed evidence shows that, since at least the 1970s, Delaware has exercised regulatory jurisdiction over projects on New Jersey's shores extending outshore of the low water mark.[176] In some cases New Jersey has itself recognized Delaware's regulatory authority and has applied for permits from Delaware for New Jersey state-run projects on its own shore,[177] a process that New Jersey describes as a "cooperative approach to a review of projects extending from the New Jersey shore beyond the low-water mark."[178] New Jersey's willingness to engage in such a "cooperative approach" is necessarily incompatible with its argument that Delaware never had any jurisdiction or basis for attempting to regulate improvements extending from New Jersey's shore into Delaware territory. *See, e.g., Illinois v. Kentucky*, 500 U.S. at 386 (stating that "we are concerned not only with what [Kentucky's] officers have done, but with what they have said, as well. And what they have said has, in several instances, supported Illinois' claim.").

In sum, evidence that New Jersey historically made conveyances of riparian rights and authorized the construction of wharves and other riparian improvements,

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[176] *See supra* Section II-D-4.

[177] *See supra* Section II-D-5.

[178] New Jersey's Brief in Support of Motion for Summary Judgment at 44.

with or without Delaware's acquiescence, is immaterial to the issue of whether Delaware has acquiesced for a "substantial" period of time in any claim by New Jersey that New Jersey alone has the exclusive right to regulate riparian developments on the eastern shore. For centuries, Delaware maintained its claim of ownership of the River up to the low water mark on New Jersey's shore. The fact that New Jersey exercised riparian rights along that boundary had no effect on Delaware's claim to title in that territory. It is also insufficient to establish that Delaware lost sovereign jurisdiction over the same land through prescription.

Since the 1960s when Delaware first promulgated a regulatory system for waterfront development along its shores, it has regulated various riparian projects extending from New Jersey's shores; and New Jersey has recognized Delaware's regulatory oversight for projects proposed both by private developers and by New Jersey itself in recent years. Although New Jersey has presented evidence that arguably shows that Delaware may have acquiesced in New Jersey exercising some jurisdiction over riparian improvements appurtenant to New Jersey's shore, it has not presented sufficient evidence to prove that Delaware effectively ceded all jurisdiction to New Jersey through the doctrine of prescription and acquiescence.

Conclusion: The Prescription Issue

New Jersey has failed to prove by a preponderance of the evidence that Delaware has acquiesced in any assertion by New Jersey that New Jersey has exclusive jurisdiction to regulate riparian improvements appurtenant to the eastern shore of the River. On balance, New Jersey has not

satisfied the stringent standards to warrant a finding that Delaware has lost the sovereign jurisdiction over its own lands that was preserved by the Compact. Therefore, I conclude that:

New Jersey has not acquired exclusive regulatory jurisdiction over riparian improvements appurtenant to its shore extending outshore of the eastern low water mark of the Delaware River within the twelve-mile circle pursuant to the doctrine of prescription and acquiescence.

RECOMMENDATIONS

For all the foregoing reasons, I recommend that the Court rule that:

(1) New Jersey has the authority to make grants, leases, and conveyances of riparian lands on the New Jersey side of the Delaware River within the twelve-mile circle only down to the low water mark.

(2) Consistent with New Jersey's law of riparian rights, New Jersey riparian owners may construct, maintain and use improvements appurtenant to the New Jersey shore extending outshore of the eastern low water mark of the Delaware River within the twelve-mile circle.

(3) The preservation of "riparian jurisdiction" contained in Article VII of the Compact does not bestow upon New Jersey regulatory jurisdiction over all aspects of riparian improvements appurtenant to the New Jersey

shore extending outshore of the eastern low water mark within the twelve-mile circle of the Delaware River; rather, New Jersey's jurisdiction outshore of that low water mark is limited to regulation of riparian rights associated with improvements extending onto Delaware's territory.

(4) Delaware, as the sovereign owner of the land outshore of the low water mark on the eastern shore of the Delaware River within the twelve-mile circle, is entitled to exercise police power jurisdiction over improvements extending onto its territory, and accordingly New Jersey's riparian jurisdiction over such improvements is not exclusive.

(5) Delaware is not estopped from challenging New Jersey's assertion of exclusive jurisdiction to regulate riparian improvements appurtenant to the New Jersey shore extending outshore of the eastern low water mark of the Delaware River within the twelve-mile circle.

(6) New Jersey has not acquired exclusive regulatory jurisdiction over riparian improvements appurtenant to its shore extending outshore of the eastern low water mark of the Delaware River within the twelve-mile circle pursuant to the doctrine of prescription and acquiescence.

A proposed Decree embodying my recommendations is attached as Appendix A.

Respectfully submitted,

RALPH I. LANCASTER, JR.
Special Master

April 12, 2007